United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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P/S

76-7097 & 76-7129

United States Court of Appeals

For the Second Circuit.

RAYMOND INTERNATIONAL, Inc.,
Plaintiff-Appellee,
against

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc.,
Defendant-Appellant.

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc.,
Third-Party Plaintiff-Appellee,
against

BAY SHORE CONCRETE PRODUCTS COMPANY,
Third-Party Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York.

JOINT APPENDIX.

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UNITED STATES COURT OF APPEALS
FILED
MAY 21 1976
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SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

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RAYMOND INTERNATIONAL, INC.,

Plaintiff-Appellee,

-against-

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons' Company and SLATTERY ASSOCIATES, INC., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc.,

Defendants-Appellants.

- -X

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons' Company and SLATTERY ASSOCIATES, INC., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc.,

Third-Party Plaintiffs-Appellees,

-against-

BAY SHORE CONCRETE PRODUCTS COMPANY,

Third-Party Defendant-Appellant.

- -X

DOCKET ENTRIES.

BEST COPY AVAILABLE

DOCKET ENTRIES

un25-70	Filed complaint issued summons	
un25-70	Filed notice of assignment	
ep.23,70	Filed stip and order that time of defts to Answer the complaint be extended to 9-19-70 Palmieri J.	
ept.30-70	Filed Interrogatories of Raymond Internatl.Inc. to deft. Peter Kiewit-Slattery.	
ept.30-70	Filed Request for Production of Documents, etc.	
Sept.24-70	Filed summons with marshal's ret. Served: Slattery Associates, Inc. by Jess W. Comer, Gen.Supt. on 8/10/70. (E.D.N.Y.) Peter Kiewit Sons' Co. by Jess W. Comer, Gen.Supt. on 8/10/70. (E.D.N.Y.)	
ct 7,70	Filed deft's interrogs. to pltff.	
ct.29-70	Filed ANSWER of Peter Kiewit-Slattery to complaint, and Jury Demand.	JRM
ct.8-70	Filed third party complaint and issued 3rd pty. summons.	
ct.14-70	Filed ORDER OF ATTACHMENT. Ordered that 3rd pty.pltfs. undertaking is fixed in the sum of $1050.; Ordered that the U.S.Marshal, SDNY levy within the jurisdiction up to the amount as will satisfy the demand of $60,000. tog. with probable interest,etc. Palmieri, J. (mailed notice).	
Nov. 9,70	Filed 3rd pty deft ANSWER to 3rd pty complaint.	M&L
Nov.13-70	Filed 3rd pty. summons with marshal's ret. Served Bayshore Concrete Prod.Co. by 10/14/70.	
Nov.27-70	Filed Amended third party answer of Bayshore Concrete Products.	
ec. 2,70	Filed stip and order that the second cause of action in the complaint herin, for the sum of $14,088.14 be discontinued. Palmieri J.	
eb 16-71	Filed copy of Order dtd 10-13-70 & Marshals' returns served: Liberty Mutual Ins. Co. by R. Appleyard on 11-13-70	
Mar 22-71	Filed pltff's answers to interrogatories	
Jun 22-71	Filed deft's & 3rd.pty.pltff's answers to interrogs.	
Apr.6-72	Filed pltff's affidavit & notice of motion ret.4-14-72 before Palmieri,J. granting judgment by default against deft's 3rd.pty.pltff's.	
Apr.6-72	Filed pltff's memorandum of law in support of his motion ret.4-14-72.	
pr.14-72	Filed affidavit of William T. Alt in connection with motion by pltff., for judgment by default.	
pr 19-72	Filed memo endorsed on motion filed 4-6-72- Motion counsented to. Settle order on notice- PALMIERI, J.	
May 8-72	Filed notice of settlement & Order that pltff's motion & 3rd.pty., deft's application are granted & deft's are directed to produce, the documents set forth in pltff's notice to produce, dated 9-24-70, no later than 30 days from the date of this order. Palmieri, J.	
eb 27-73	Filed deft & third party pltff.Kiewit's notice of motion, Re: Amend Answer, ret before Motley J. on 3/5/73	
eb 27-73	Filed Deft & third party pltff. Kiewit's memo of law.	
Mar 2-73	Filed Pltffs Interrogatories propounded to third party deft.	
ar 2-73	Filed Pltffs notice of motion, Re: Leave to file amended complaint, ret before Motley J. on3/5/73	
ar 2-73	Filed Pltffs memo of law.	
ar 8-73	Filed stip & order that pltffs motion for an amended complaint is adjourned to 3/19/73. So Ordered Motley J.	
ar 8-73	Filwd stip & order that the deft & third party pltffs motion to amend its answer & third party complaint is adjourned to 3/19/73, So Ordered Motley J.	
ar 19-73	Filed Third party Defts affidavit in opposition to motions. By Frank A. Lyons	
ar 19-73	Filed third party defts memo of law in opposition to the motion of the deft. & Third party pltff. to amend its answer,	
ar 19-73	Filed third party defts affidavit by Frank A. Lyons.	
23-73	Filed reply affirmation by J. L. [illegible] Re:Motion.	
pr 18-73	Filed memo endorsed on motion to amend complaint filed Mar 2-73.	

DOCKET ENTRIES

Apr 18-73	Filed memo endorsed on motion to amend complaint filed Mar 2-73: Motion to file an amended complaint is granted. Pltff to file & ser the complaint within 10 days. 3rd pty. deft. has 20 days thereafte to answer. This cause shall then proceed in accordance with the orc entered this date in connection with the motion of 3rd pt. pltff. MOTLEY,J. (mailed notices)
Apr 18-73	Filed memo endorsed on motion of 3d pty. pltff to amend 3d pty. complai filed Feb 27-73: Motion granted. 3rd pty. complaint to be served & fil within 10 days,etc. All pre-trial discovery must be completed by May 21 1973. The parties have until June 25, 1973 to file pre-trial memoranda. On that date the parties are to report to Magistrate Jacobs for assignm to a magistrate. MOTLEY,J. (mailed notices)
Apr.20-73	Filed Amended ANSWER & third pty.complaint.by deft.3rd.pty.pltff.
May. 1-73	Filed ANSWER by 3rd.pty.deft. to amended 3rd.pty. complaint.
May. 1-73	Filed ANSWER by 3rd.pty.deft. to complaint.
Apr.27-73	Filed amended complaint by pltff.
May.1-73	Filed consent & order to change of attorney for 3rd.pty.pltff. Peter Kiewit-Slattery. So ordered. Motley,J.
May.7-73	Filed Order that the previously issued order of attachment be, amended be increased to the sum of $1,750.00 . Answer and the 3rd.pty. complaint of the deft. 3rd.pty.pltff. be amended to include the two additional causes of action. Pre-trial discovery, must be completed no later than 5-21-73, all parties are to , report to Magistrate Jacobs for assignment to a Magistrate for, preparation of a pretrial order. Motley,J.
May.7-73	Filed affidavit of J.I. Lysaght Re: order of settlement.
May.11-73	Filed 3rd.pty. summons with marshals return: Served Bayshore Concrete Products on 5-4-73.
Jun.8-73	Filed ANSWER of 3rd.pty.deft. to pltff's interrogs.
6-12-73	Filed deft. and 3rd pty. plft's.(Peter Kiewit Slattery) request for production of documents under rule 34. from pltf.
6-12-73	Filed deft. and third pty. pltf. Peter Kiewit Slattery request for production of documents,etc. under Rule 34 from Bayshore Concrete Prod.Co.,(3rd pty. deft.)
6-11-73	Filed interrogatories of third pty. deft.Bayshore Concrete Products Co.propounded to deft. and third pty. pltf.Peter Kiewit Slattery.
6-19-73	Filed interrogatories of third pty. deft.Bayshore Concrete Productd Co.,propounded to the plft.Raymond Intl. Inc.,

DOCKET ENTRIES

5-18-73	Filed third party deft.Bayshore Concrete Products Co. request for production of documents from pltf.
6-18-73	Filed third party deft.Bayshore Concrete Products Co. request for production of documents from deft/third pty pltf.
Aug 9-73	Filed ANSWERS of planiff,Raymond International to interrogatories served by 3rd party Deft..
Nov.12-73	Pre-trial conference held...Jacobs, U.S.Mag.
17 73	PRE-TRIAL CONFERENCE HELD BY JACOBS, U.S. MAG
Ja 23-74	PRE-TRIAL CONFERENCE HELD BY Jacobs, U.S. MAG.
eb.25-74	Filed consent and pre-trial order- MOTLEY, J.
une 5-74	Before MOTLEY, J. non-jury trial begun.
une 6-74	Trial cont'd
ne 7-74	Trial cont'd
une 10-74	Trial cont'd and concluded (4 days). Decision reserved.
g. 5-74	Filed pltff's post trial requests for the Court to make the following findings of fact and rulings of law.
Aug. 7-74	Filed transcript of record of proceedings dated 6-5,6,7,10-74
Dec.29-75	Filed Opinion No. 43632 re:action brought by Pltff for damages sustaine by one of its barges during construction of the Jamaica Bay Bridge... and for the reasons stated,the burden of proof on the need to minimize damages is on the party seeking to limit recovery.Mayes,supra.Bayshore has failed to offer any such proof.Accordingly,the court finds that th alternate means of listing the beams was reasonable & the additional c incurred by Kiewit in utilizing a different method are properly assess against Bayshore as a foreseeable and reasonable expense flowing from Bayshore's breach of warranty & contract.Long Island Lighting Co.v.Cit of Glen Cove . 64 Misc 2d 786,315 N.Y.S. 2d 656 (1970).Submit order on five days' notice.MOTLEY,J (m-n)
Jan. 14-76	Filed Order of discontinuance- MOTLEY, J. (m/n)
Jan. 14-76	Filed Judgment # 76,042- that pltff. recover $30,200 from defts. and third-pty pltffs. Peter Kiewit- Slattery (Joint Venture) s/h/a etc. and from third-pty deft. Bay Shore Concrete Products Co, jointly and severally-- that Peter Kiewit recover from Bayshore $ 44,386.22 and any amount that Kiewit may pay to pltff-- that pltff. and Peter Kiewit recover interest as indicated and costs against Bayshore. MOTLEY, J. -- Judgment entered 1-14-76 Clerk (m/n)
1-27-76	Filed Order of discontinuance-- MOTLEY, J.

DOCKET ENTRIES

02-13-76	Filed deft. & third-pty pltff. Peter Kiewit-Slattery (Joint Venture) s/h/a Peter Kiewit Sons Company and Slattery Associates, Inc, d/b/a Peter Kiewit Sons' Company- Slattery Assocaites, Inc. (Joint enture) appeals notice of a peal to the USCA FROM TH FINAL JUDGMENT DATED 01-12-76 andENTERED 01-14-76 and from each and every part of said judgment except so much of said judgment which ordered and adjudges that said deft. and third pty pltff. recover from Bayshore Concrete roducts Co. the sum of $44,386.22, etc. as indicated. Copies mailed to: Symmers, Fish & arner- Segan, Culhane, emerov & Geen and McMahon & Lyons. Ent. 02-13-76
-27-76	Filed third-pty deft. Bayshore Concrete Products Co. notice of appeal to the USCA from the judgment entered on 01-14-76 in favor of the pltff and against the deft. eter Kiewit-Slattery (Joint venture) and the said third-pty deft. further appeals from the judgment in favor of the deft. and third-pty pltff Peter Kiewit-Slattery (Joint Venture) and against said third pty deft. and from each and every part of said judgment. Copy to: Symmers, Fish & arner and James I. Lysaght. Ent 03-01-76

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RAYMOND INTERNATIONAL INC.,

Plaintiff,

against

PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, Inc., doing business as Peter Kiewit Sons' Company-Slattery Associated, Inc. (Joint Venture),

Defendants,

and

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as PETER KIEWIT SONS COMPANY AND SLATTERY ASSOCIATES, Inc., doing business as Peter Kiewit Sons Company Slattery Associates, Inc. (Joint Venture),

Third Party Plaintiffs,

against

BAYSHORE CONCRETE PRODUCTS COMPANY,

Third Party Defendant.

70 Civ. 2712 CBM

Plaintiff, by its attorneys, Symmers, Fish & Warner, complaining of the defendants and third-party defendant, upon information and belief, alleges as follows:

FIRST CAUSE OF ACTION AGAINST DEFENDANTS PETER KIEWIT-SLATTERY (JOINT VENTURE)

FIRST: This is a case of admiralty and maritime jurisdiction as hereinafter appears more fully, and is an admiralty or maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

SECOND: At all times hereinafter mentioned Raymond International Inc. was and still is a corporation organized and existing under the laws of the State of New Jersey with an office and principal place of business at 2 Pennsylvania Plaza, New York, New York 10001.

THIRD: At all times hereinafter mentioned defendants Peter Kiewit Sons' Company and Slattery Associates, Inc. were and still are corporations duly organized and existing according to law with an office and principal place of business having an address of P. O. Box 127, Rockaway Beach, New York, 11693, and were and now are engaged in and doing business as a joint venture for the purpose of heavy marine contracting including bridge building and hiring and employing vessels, craft and equipment incident thereto, under the name and style of Peter Kiewit Sons' Company and Slattery Associates, Inc., doing business as Peter Kiewit-Slattery (Joint Venture).

FOURTH: On or about 28 April 1970, pursuant to general contract dated at New York on 12 August 1968, a copy of which is attached hereto as Exhibit A, plaintiff's derrick barge Century was employed at the Cross Bay Bridge, Rockaway, New York and engaged in lifting for defendants a heavy reinforced prestressed concrete girder, T.205, from Scow #1400.

FIFTH: At all times herein mentioned the operation of the Century was under the complete direction and supervision of defendants. Defendants also furnished all special fittings, lifting devices, strongbacks and slings required for hooking on to and hoisting the various girders together with all labor for slinging and guiding into place. At all times the Century, her standard complement of slings and gear, was seaworthy and in good operating condition and her standard operating crew was experienced, able, careful and attentive to their duties.

SIXTH: As the Century started to lift said girder T.205, the straps provided by defendants for lifting purposes, parted, causing the lifting beam to swing and strike heavily against the Century, causing serious damage to the Century and its fittings and equipment.

SEVENTH: Said casualty and damage to the Century was due solely to the negligence of defendants in providing inadequate and improper fittings and devices and in the direction of and supervision of the operation by defendants.

EIGHTH: Said casualty also constituted a breach of both express and implied warranties of defendants that said girder would be in fit condition for lifting purposes and that all special fittings, lifting devices, strongbacks and slings required would be adequate and fit for the purpose for which they were intended to be used. By reason of said contract, Exhibit A hereto, defendants are obligated to indemnify plaintiff for the loss sustained by plaintiff.

NINTH: By reason of the premises, plaintiff has suffered damages in the sum of $60,000, no part of which has been paid although payment thereof has been duly demanded.

Second cause of action against third-party defendant Bayshore Concrete Products Corp. (sued herein as Bayshore Concrete Products Company)

TENTH: Plaintiff realleges with the same force and effect as if herein set forth at length the allegations of Paragraphs First, Second, Fourth, Fifth, Sixth and Ninth of this amended complaint.

ELEVENTH: At all times hereinafter mentioned third-party defendant, Bayshore Concrete Products Corp., was and is a corporation organized and existing under the laws of the State of Virginia with an office and principal place of business at Cape Charles, Virginia.

TWELFTH: The equipment which failed, as set forth in Paragraphs Fourth and Sixth hereof, had been purchased for the purpose of bridge building by the defendants from the third-party defendant at a prior date.

THIRTEENTH: Third-party defendant was engaged in the business of manufacturing and selling such products as structural members of the Cross Bay Parkway Bridge. Said Girder T.205 and its lifting appurtenances were in a defective condition when sold and unreasonably dangerous to the users thereof. Said defective condition was also due to the negligence of third-party defendant and constituted a breach of its implied warranty of fitness for use.

Wherefore, plaintiff demands judgment against defendants Peter Kiewit-Slattery (Joint Venture) on the first cause of action in the sum of $60,000, with interest from 28 April 1970, and judgment against third-party defendant, Bayshore Concrete Products Corp., on the second cause of action in the sum of $60,000, with interest from 28 April 1970, and the costs of this action, together with its attorneys' fees.

Dated: New York, New York
Apr 18 1973

SYMMERS, FISH & WARNER
By: (Illegible)
Member of the Firm
Attorneys for Plaintiff
Office and Post Office Address
345 Park Avenue
New York, New York 10022

To:

James I. Lysaght, Esq.
Attorney for Defendant
Third-Party Plaintiff
Peter Kiewit-Slattery (Joint Venture)
233 Broadway
New York, New York 10007

Messrs. McMahon & Lyons
Attorneys for Third Party Defendant
111 Broadway
New York, New York 10006

Exhibit A, Annexed to Amended Complaint.

Contract between Plaintiff and Defendant Kiewit is reproduced, *infra*, as Plaintiff's Exhibit 1.

Amended Answer and Third Party Complaint of Peter Kiewit-Slattery, etc.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, Third Party Plaintiff, Peter Kiewit-Slattery (Joint Venture), sued herein as Peter Kiewit Sons Company and Slattery Associates, Inc., doing business as Peter Kiewit Sons Company-Slattery Associates, Inc. (Joint Venture), answering the complaint of the plaintiff herein, alleges, upon information and belief:

FIRST: Denies the allegations contained in paragraphs of the complaint designated "First", "Twelfth" and "Thirteenth" and respectfully refers all questions of law to this honorable Court.

SECOND: Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph of the complaint designated "Second".

THIRD: Denies, upon information and belief, the allegations contained in paragraphs of the complaint designated "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Fourteenth" and "Fifteenth".

FOURTH: Further answering and for a separate and complete defense, Defendant-Third Party Plaintiff, Peter Kiewit-Slattery (Joint Venture) alleges that any damages that may have been suffered by the plaintiff was not due to any fault, neglect or want of care, or affirmative act or omission on the part of this Defendant-Third Party Plaintiff, or those for whose acts this Defendant-Third Party Plaintiff is responsible. That if there was any fault, neglect or want of care, it was that of the plaintiff and/or that of others for whose acts this defendant was not and is not responsible and over whom it exercised no supervision or control.

As and for a first cause of action by Peter Kiewit-Slattery (Joint Venture) against Third Party Defendant, Bayshore Concrete Products Company, Kiewit alleges all upon information and belief:

FIRST: This is a case of Admiralty and Maritime Jurisdiction as hereinafter appears more fully, and is an Admiralty or Maritime claim within the meaning of Rule 9 (H) of the Federal Rules of Civil Procedure.

SECOND: That at all times herein mentioned, Defendants-Third Party Plaintiffs, Peter Kiewit-Slattery (Joint Venture), sued herein as Peter Kiewit Sons Company and Slattery Associates, Inc., doing business as Peter Kiewit Sons Company-Slattery Associates, Inc. (Joint Venture) (hereinafter referred to as Kiewit) were corporations organized, existing and/or doing business under the laws of the State of New York and doing business as a joint venture with an address of P. O. Box 127, Rockaway Beach, New York.

THIRD: That at all times herein mentioned, Bayshore Concrete Products Company (hereinafter referred to as Bayshore) was and is a corporation organized and existing under the laws of the State of Virginia with an office and principal place of business at Cape Charles, Virginia.

FOURTH: That heretofore Kiewit and Bayshore, as aforesaid, entered into an agreement dated March 21, 1968 (to which agreement Kiewit begs leave to refer as though the same were set forth herein in its entirety) wherein and whereby the said Bayshore agreed to sell and Kiewit agreed to purchase, among other things, certain prestressed concrete girders or beams to be used by Kiewit in connection with the construction of Cross Bay Parkway Bridge, in the City and State of New York. (A copy of said agreement is attached hereto.)

FIFTH: That by the terms of said agreement, the said Bayshore (therein referred to as the "Seller") agreed, warranted and guaranteed the materials covered by said agreement which included said prestressed concrete girders or beams, their straps and/or lifting hooks which constituted an integral part thereof, as aforesaid, and warranted expressly and/or impliedly that said prestressed concrete girders or beams and their straps and lifting hooks were of merchantable quality and were reasonably fit for the purposes for which they were intended.

SIXTH: That pursuant to the terms of said agreement, the said Bayshore agreed further to indemnify Kiewit against, and save them harmless from any and all claims, suits or liability, loss, damage costs, expenses and attorneys fees suffered or incurred on account of any act or omission of the said Bayshore, its officers, agents, employees or servants.

SEVENTH: That thereafter and prior to April 28, 1970, this Defendant-Third Party Plaintiff, Kiewit, entered into an agreement with the plaintiff herein, Raymond International, Inc., hereafter referred to as Raymond, to which agreement Kiewit begs leave to refer as though the same were set forth herein at length, wherein and whereby, said Raymond, among other things agreed to furnish the hoisting services of Raymond's floating "A" Frame Derrick Century, to place and land prestressed concrete girders or beams, in connection with the work being done by Kiewit in the construction of the said Cross Bay Parkway Bridge, as aforesaid.

EIGHTH: That on or about the 28th day of April 1970 the plaintiff, Raymond International, Inc. was engaged in lifting for Defendant-Third Party Plaintiff, Kiewit, one of said prestressed concrete girders known and designated as a heavy reinforced prestressed concrete girder, T 205 from a certain Scow #1400 by means of plaintiffs derrick barge Century, in connection with work being performed by Kiewit on the Cross Bay Parkway Bridge, as aforesaid.

NINTH: That on or about the 28th day of April 1970, as the said derrick barge Century started to lift said girder T 205, the straps and/or lifting hooks, which constituted an integral part of said girder for lifting purposes, parted, causing the lifting beam of said derrick barge to swing and strike heavily against the Century, allegedly causing damage to said derrick barge and its fittings and equipment and thereby impeding and delaying the progress of the work being done, by this Defendant-Third Party Plaintiff, Kiewit, in connection with the construction of the aforesaid Cross Bay Parkway Bridge.

TENTH: That as a result of the aforesaid casualty, the work being performed by this Defendant-Third Party Plaintiff, Kiewit was thereby impeded, and Kiewit was required to and did expend additional time, effort and money in order to complete the work which it was performing in connection with the construction of said Cross Bay Parkway Bridge, as aforesaid.

ELEVENTH: That the aforesaid casualty and consequent loss or losses were caused wholly and solely by reason of the negligence of the Third Party Defendant, Bayshore in, among other things, providing inadequate and improper fittings and devises in said prestressed concrete girders or beams and in being otherwise careless and negligent in the premises.

TWELFTH: That said casualty and consequent damages were caused solely by the negligence of the Third Party Defendant, Bayshore, without any negligence on the part of Kiewit contributing thereto.

THIRTEENTH: That by reason thereof, Kiewit was damaged in the sum of Forty Thousand ($40,000.00) dollars.

AS AND FOR A SECOND CAUSE OF ACTION BY PETER KIEWIT-SLATTERY (JOINT VENTURE), AS AFORESAID AGAINST THIRD PARTY DEFENDANT, BAYSHORE CONCRETE PRODUCTS COMPANY, KIEWIT ALLEGES ALL UPON INFORMATION AND BELIEF:

FOURTEENTH: Defendant-Third Party Plaintiff, Kiewit, repeats, realleges and reaffirms each and every allegation contained in paragraphs of this Third Party Complaint designated "First" through "Thirteenth" with the same force and effect as though the same were more fully set forth herein at length.

FIFTEENTH: That the aforesaid casualty and consequent loss or losses were caused wholly and solely by reason of the breach of the terms of the contract between Kiewit and Bayshore and breach of warranties, express and/or implied, by said Third Party Defendant, Bayshore.

SIXTEENTH: That by reason thereof, Kiewit was damaged in the sum of Forty Thousand ($40,000.00).

As and for a third cause of action and as a third party action for indemnification by Peter Kiewit-Slattery (Joint Venture) as aforesaid, against Third Party Defendant, Bayshore Concrete Products Company, Kiewit alleges upon information and belief:

SEVENTEENTH: Defendant-Third Party Plaintiff, Kiewit, repeats, realleges and reaffirms each and every allegation contained in paragraphs of this Third Party Complaint designated "First" through "Thirteenth" with the same force and effect as though the same were more fully set forth herein at length.

EIGHTEENTH: That attached hereto is a copy of the complaint in the action by "Raymond" against "Kiewit" in which said "Raymond" alleges a certain cause or causes of action against this Defendant-Third Party Plaintiff, "Kiewit".

NINETEENTH: That in said complaint, to which "Kiewit" begs leave to refer in its entirety, the said plaintiff therein, Raymond, alleges, in substance, that it sustained damages on or about the 28th day of April 1970 when its derrick barge Century started to lift a certain girder or beam known as a heavy reinforced prestressed concrete girder, T 205, as hereinbefore referred to and described, from Scow No. 1400, the straps and/or lifting devises or hooks, which constituted an integral part of said girder for lifting purposes, parted, causing the lifting beam of said derrick barge to swing and strike heavily against the said Century, allegedly causing damage to said derrick barge and its fittings and equipment in the amount of $60,000.00.

TWENTIETH: That this Defendant-Third Party Plaintiff, "Kiewit" denies that it was negligent and denies that it breached any agreement with or duty owing to the plaintiff, "Raymond".

TWENTY-FIRST: That if said plaintiff sustained damages as alleged in its complaint through negligence other than its own and if the plaintiff should recover any judgment against Kiewit, then such damages and such recovery will have been brought about by reason of the primary and active negligence of the Third Party Defendant, Bayshore, no active negligence on the part of Kiewit having contributed to said accident, and Kiewit will be entitled to recover over from Bayshore the full amount of any judgment which may be recovered against it by plaintiff in this action in the amount of $60,000.00 together with costs, disbursements and counsel fees.

AS AND FOR A FOURTH CAUSE OF ACTION AND AS A THIRD PARTY ACTION FOR INDEMNIFICATION BY PETER KIEWIT-SLATTERY (JOINT VENTURE) AS AFORESAID, AGAINST THIRD PARTY DEFENDANT, BAYSHORE CONCRETE PRODUCTS COMPANY, KIEWIT ALLEGES UPON INFORMATION AND BELIEF:

TWENTY-SECOND: Defendant-Third Party Plaintiff Kiewit, repeats, realleges and reaffirms each and every allegation contained in paragraphs of this Third Party Complaint designated "First" through "Twentieth" with the same force and effect as though the same were more fully set forth herein at length.

TWENTY-THIRD: That if said plaintiff sustained damages as alleged in its complaint and if the plaintiff should recover any judgment against Kiewit, then such damages and such recovery will have been brought about by reason of the breach of the terms of the contract between Kiewit and Bayshore and breach of warranties, express and/or implied by said Bayshore and by reason thereof and by the terms of said agreement, to which Kiewit begs leave to refer as though the same were set forth herein in its entirety, Kiewit will be entitled to recover over from Bayshore the full amount of any judgment which may be recovered against it by the plaintiff in this action in the amount of $60,000.00 together with costs, disbursements and counsel fees.

TWENTY-FOURTH: That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, Defendant-Third Party Plaintiff, Kiewit, demands judgment against Third Party Defendant, Bayshore, on its first cause of action in the sum of $40,000.00; on its second cause of action $40,000.00; together with interest, costs and disbursements; and further demands judgment dismissing the complaint of the plaintiff, Raymond International, Inc. with costs and disbursements, and, if the plaintiff shall recover judgment against Kiewit, then Kiewit demands judgment over and against the third party defendant, Bayshore, in like amount together with costs, disbursements, and counsel fees.

s/ JAMES I. LYSAGHT
Attorney for Defendant-Third
Party Plaintiff
233 Broadway
New York, New York
Room 1069
WO 2 3050

Agreement Between Bayshore and Kiewit, Annexed to Foregoing Answer.

(Reproduced, *infra,* as Plaintiff's Exhibit 2.)

Answer of Defendant Bayshore to Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Third Party Defendant, Bayshore Concrete Products Corp., sued herein as Bayshore Concrete Products Company, by its attorneys, McMahon & Lyons, as and for its answer to the Complaint of the plaintiff, alleges:

1. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "First" of the complaint, and respectfully refers all questions of law to the Honorable Court.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs "Second", "Fourth", "Sixth" and "Fifth" of the complaint.

3. Denies each and every allegation contained in Paragraph "Ninth" of the complaint.

4. Denies each and every allegation contained in Paragraph "Thirteenth" of the complaint.

AS AND FOR A SEPARATE DEFENSE AGAINST THE PLAINTIFF, RAYMOND INTERNATIONAL INC. THE THIRD PARTY DEFENDANT, BAYSHORE CONCRETE PRODUCTS CORP., ALLEGES:

5. That any damages that may have been suffered by the plaintiff was not due to any fault, neglect or want of care, or affirmative act or omission on the part of this Third Party Defendant, or those for whose acts this Third Party Defendant is responsible.

6. That if there was any fault, neglect or want of care, it was that of the plaintiff and/or that of others for whose acts this Third Party Defendant was not and is not responsible and over whom it exercised no supervision or control.

Wherefore, the Third Party Defendant, Bayshore Concrete Products Corp., demands judgment dismissing the complaint of the plaintiff herein together with the costs and disbursements of this action.

Dated: New York, New York
April 27, 1973

McMAHON & LYONS
Attorneys for Third Party Defendant Bayshore Concrete Products Corp.
P. O. and Office Address
111 Broadway
New York, New York 10006
(212) 233-6500
By: Frank A. Lyons
Member of Firm

To:

Symmers, Fish & Warner, Esqs.,
Attorneys for Plaintiff
345 Park Avenue
New York, New York 10022

James I. Lysaght, Esq.
Attorney for Defendant, Third Party Plaintiff
Peter Kiewit-Slattery (Joint Venture)
233 Broadway
New York, New York 10007

Answer of Third-Party Defendant Bayshore.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Third-Party Defendant, Bayshore Concrete Products Corp., sued herein as Bayshore Concrete Products Company, by its Attorneys, McMahon & Lyons, as and for its answer to Third-Party Complaint, alleges:

1. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph designated "First" of the complaint, and respectfully refers all questions of law to the Honorable Court.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph "Second" of the complaint.

3. Upon information and belief denies each and every allegation contained in Paragraphs "Fourth", "Fifth", and "Seventh" of the complaint.

4. Denies each and every allegation contained in Paragraph "Sixth" of the Third-Party Complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO THE THIRD PARTY COMPLAINT THE THIRD PARTY DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

5. The negligence of the Third Party Plaintiff, Peter Kiewit-Slattery caused/or contributed to the alleged accident and the ensuing claimed injuries to themselves and/or the plaintiff, Raymond International Inc., in that it failed to use due diligence and safety in the careful handling and control of the then existing structural member furnished by the defendant; it failed to have proper, safe and adequate equipment to handle said structural member; and, it failed to use due diligence in

the safe-keeping of said member which was the primary and/or contributing cause of the accident as alleged by the plaintiff and was otherwise careless in the premises.

As and for a second separate and complete defense to the Third Party Complaint the Third Party Defendant alleges:

6. That Third Party Plaintiff entered into a written contract with the Third Party Defendant dated May 8, 1968 to purchase certain structural members for the Cross Bay Parkway Bridge.

7. That pursuant to the terms of said contract it was agreed that Third Party Defendant was relieved of any liability with regard to said structural members upon delivery at its dock to the Third Party Plaintiff.

8. That pursuant to the terms of the aforesaid contract upon delivery to the Third Party Plaintiff it assumed all responsibility for damages arising thereafter in the transporting or handling of the aforesaid structural members.

9. That pursuant to the contract Third Party Plaintiff assumed all liability arising from the damages as complained of by the plaintiff, Raymond International, Inc.

Wherefore, Third Party Defendant, Bayshore Concrete Products Corp., sued herein as Bayshore Concrete Products Company, demands judgment dismissing the complaint, together with the costs and disbursements of this action.

McMAHON & LYONS
By: Frank A. Lyons
Attorneys for Third Party Defendant, Bay Shore Concrete Products Corp., sued herein as Bayshore Concrete Products Company
Office & P. O. Address
111 Broadway
New York, New York 10006

Pre-Trial Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The parties to this action or their attorneys having appeared before the court, Magistrate Martin D. Jacobs, at a pre-trial conference on 1 February 1974 pursuant to Rule of Civil Procedure 16, the following action was taken:

1. It is ordered that the following amendments to the pleadings are allowed: none.
2. The parties agreed that the trial of this action shall be based upon the pleadings as amended, except that the following issues raised by the pleadings are abandoned: none.
3. The parties stipulated the followings facts:

At all times hereinafter mentioned, plaintiff, Raymond International Inc., (hereinafter referred to as Raymond) was and still is a corporation organized and existing under the laws of the state of New Jersey with an office and principal place of business at 2 Pennsylvania Plaza, New York, New York 10001 and was the owner and operator of the derrick barge Century.

At all times hereinafter mentioned, Defendants-Third Party Plaintiffs, Peter Kiewit-Slattery (Joint Venture), sued herein as Peter Kiewit Sons Company and Slattery Associates, Inc., doing business as Peter Kiewit Sons Company-Slattery Associates, Inc. (Joint Venture) (hereinafter referred to as Kiewit) were and still are corporations organized, existing and/or doing business under the laws of the State of New York and doing business as a joint venture with an address at P.O. Box 127, Rockaway Beach, New York.

At all times hereinafter mentioned Bayshore Concrete Products Company, (hereinafter referred to as Bayshore) was and is a corporation organized and existing under the laws of the State of Virginia with an office and principal place of business at Cape Charles, Virginia.

The Barge Century is an A-frame derrick barge of 1289 gross tons; length 165 feet; beam 66 feet; and depth of hold 18 feet (all molded); built in 1965 of steel at Orange, Texas.

4. The contentions of the parties are as follows:

I

Raymond contends as respects Kiewit that the casualty resulted from the negligence of Kiewit in providing inadequate and improper fittings and devices and in direction of and supervision of the operation. Raymond further contends that the casualty constituted a breach of both express and implied warranties of Kiewit and that by reason of contract Kiewit is obliged to indemnify Raymond for the loss sustained. As to Bayshore, Raymond contends that the equipment that failed had been purchased by Kiewit for the purpose of bridge building, that Bayshore was engaged in the business of manufacturing and selling such products as structural members for bridges and that said girder and its lifting appliances were in a defective condition when sold and unreasonably dangerous to the users thereof. Raymond further contends that said defective condition was also due to the negligence of Bayshore and constituted a breach of its implied warranty of fitness for use.

II

Kiewit contends:

(1) As to issues raised in plaintiff's complaint.

A. Assuming the damages of the plaintiff may be proven; they were brought about by the fault, neglect, and want of care, and/or affirmative acts and/or omissions of the plaintiff and/or the third party defendant.

B. The operations of the derrick barge Century were being carried out by the complement or crew of the Century as provided by plaintiff.

C. Plaintiff was to have provided a competent sufficient complement to operate said derrick barge Century, together with all necessary appurtenances.

D. Any damages sustained by plaintiff were caused by the fault, neglect, want of care, affirmative acts and omissions of the complement and crew provided by plaintiff.

(2) Contention as to third party defendant *re* causes of action in the third party complaint designated "third" and "fourth".

A. At all times relevant thereto, there was in full force and effect a contract between defendant-third party plaintiff Kiewit and third party defendant Bayshore.

B. The third party defendant breached the terms of said contract by virtue of supplying a girder (T-205) which was not reasonably fit for the purposes for which it was intended.

C. Third party defendant is bound to indemnify and hold harmless the defendant-third party plaintiff from any resultant, consequential, and incidental damages to defendant-third party plaintiff flowing from the incidents giving rise to this lawsuit.

D. Defendant third party plaintiff believes it is entitled to coverage as an additional insured under a policy of insurance issued to third party defendant and/or plaintiff.

(3) Contention as to third party defendant *re* causes of action in the third party complaint designated "first" and "second".

A. Owing to the casualty involved herein, the defendant-third party plaintiff was required to and did expend additional time, effort, manpower, and money to complete the work in progress.

B. Said loss or losses were caused by reason of the failure of the third party defendant to properly and completely perform the terms of any and all contracts in force between these parties.

C. Defendant third party plaintiff was damaged to the extent of $40,000.00 plus costs, disbursements, interest and litigation expenses, including counsel fees by the tortious acts and omissions of the third party defendant.

D. The damages sustained were brought about by the negligence and/or breach of contract of third party defendant.

III

Bayshore Concrete Products Corp. contends it did not breach its contract with Peter Kiewit or any warranties expressed or implied. It further contends that the proximate cause of the occurrence was the improper handling of the concrete grider and the negligence of the plaintiffs and third party plaintiff. That the damages alleged by the plaintiff and third party plaintiff were not proximately caused by any breach of contract or negligence of Bayshore.

5. The exhibits which each party expects to offer at the trial are:

Plaintiff's Exhibits

1. Contract of 12 August, 1968 between Raymond and Kiewit.
2. Contract of 21 March, 1968 between Kiewit and Bayshore.
3. Report of Captain of the Century
4. Survey report A. Holm-Andersen "Case no. 5903" dated 20 May 1970.
5. Raymond's repair vouchers
6. Photographs taken by the several parties
7. Investigation records of Kiewit
8. Plaintiff also intends to rely upon material offered in evidence by the other parties.

Kiewit's Exhibits

1. Any exhibits proffered by any party.
2. All relevant contracts, riders underlying correspondence, blueprints, specifications, etc.
3. Any inspection reports and surveys; whether taken or secured by any party to this action, their representatives, governmental authorities, or others.
4. Repair invoices
5. Photos of the subjects of this litigation.
6. Investigation reports and surnames of the parties to this litigation.

7. Reports of experts.
8. Relevant policies of insurance.
9. The defendant third party plaintiff reserves the right to amend this pre trial order to include further exhibits.

Bayshore's Exhibits

Defendant will furnish the other parties with a list of its exhibits within 10 days from the date hereof.

Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to the other parties and to the Court. Such notice shall set forth the reason why the exhibit was not heretofore identified.

6. The parties have not agreed to limit the number of expert witnesses. Each party will furnish to the other parties at least one week before trial the names, addresses, and specialties of the expert witnesses it intends to call.

7. Raymond seeks recovery of its repair costs of approximately $35,000 from either Kiewit or Bayshore or both, together with interest and costs.

Kiewit seeks indemnity from Bayshore for any sum for which it may be adjudged liable to Raymond together with interest, costs and attorneys fees and also seeks recovery from Bayshore of the sum of $40,000 by reason of additional time, effort and money it was required to expend to complete the work it was performing in connection with the construction of said Cross Bay Parkway together with interest and costs.

8. The parties also agreed on the following matters: None.

9. The issues to be tried are formulated by the Court as follows:

(a) Whether there was any negligence or breach of warranty or contract on the part of Kiewit which caused contact between the lifting beam and the Century.

(b) Whether in any event Kiewit is obligated to indemnify Raymond for the loss which Raymond has sustained.

(c) Whether Bayshore is liable by reason of negligence or strict products liability obligation to indemnify Raymond for the loss which Raymond sustained.

(d) Whether Bayshore is liable by reason of negligence or contract to indemnify Kiewit for any sums for which Kiewit may be adjudged liable to Raymond and whether Bayshore is liable to Kiewit for any other loss which Kiewit may have sustained as alleged in its third party complaint.

(e) What is the amount of damage or loss sustained by Raymond.

(f) What is the amount of damage or loss sustained by Kiewit.

Dated: New York, New York
Feb. 1, 1974

So Ordered:

M. D. J.
U. S. D. J.

Consented To:

Symmers, Fish & Warner
Frederick Fish
Attorneys for Plaintiff

James I. Lysaght,
Attorney for Defendants, Third-Party Plaintiffs

Segan, Culhane, Nemerov & Geen, P.C.
by Stanley Geen
Attorneys for Third-Party Defendant

TRANSCRIPT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------x

RAYMOND INTERNATIONAL,

Plaintiff,

-against-

PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, INC., doing business as PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATED, INC. (Joint Venture),

Defendants,

and

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as Peter Kiewit Sons Company -Slattery Associates, Inc. (Joint Venture),
Third Party Plaintiffs,

-against-

BAYSHORE CONCRETE PRODUCTS COMPANY,

Third Party Defendant.

--------------------------------x

Before:
HON. CONSTANCE BAKER MOTLEY,
District Judge.

70 Civ. 2712

New York, June 5,6,7,10, 1974

STENOGRAPHER'S MINUTES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

Raymond International,

Plaintiff,

-against -

Peter Kiewit Sons' Company and
Slattery Associates,Inc., doing business
as Peter Kiewit Sons' Company-Slattery
Associated, Inc. (Joint Venture),

70 Civ. 2712

Defendants,

and -

Peter Kiewit-Slattery (Joint Venture)
sued herein as Peter Kiewit Sons
Company and Slattery Associates, Inc.,
doing business as Peter Kiewit Sons
Company-Slattery Associates, Inc.
(Joint Venture),

Third Party Plaintiffs,

- against -

Bayshore Concrete Products Company,

Third Party Defendant.

---x

June 5, 1974
11:00 a.m.

BEFORE:

HON. CONSTANCE BAKER MOTLEY,

District Judge

BEST COPY AVAILABLE

Symmers, Fish & Warner, Esqs.,
Attorneys for Plaintiff
Frederick Fish, Esq., of Counsel

James I. Lysaght, Esq.,
Attorney for Third Party Plaintiffs

Segan, Culhane, Nemerov & Geen, Esqs.,
Attorneys for Third Party Defendant
Stanley Geen, Esq., of Counsel

(Case called. All sides answered "ready.")

THE COURT: The Court will require an opening statement from all the parties, and at the close of your opening statement the Court will receive your documents in evidence and hear any objections there might be so that we don't interrupt the testimony of witnesses for the receipt of documents.

You can make an opening statement which would include a succinct statement of what each witness will testify to, and then, as I have said, at the close of your statement we will receive your documents and hear any objections, if any.

The plaintiff will proceed.

[illegible] FISH: May it please the Court, on 28 April 1970, the de[illegible]dantKiewit -- the defendant whom I shall refer to as Kiewit herein -- was engaged in construction and erection of the Cross Bay Bridge in Jamaica Bay, New York.

The work included procuring, erecting, placing in position, a large number of precast concrete structural members. Certain of those members were called T beams, and it is a T beam that we are concerned with in this case.

This concrete T beam was eight feet high, was

130 feet long, was two feet thick at the bottom, and weighed 130 tons.

The derrick barge Century is owned by the plaintiff, and it was used to lift these beams from scows which had been placed alongside the Century and then move them into position on the bridge structure that was being erected and placed them there.

Plaintiff Raymond furnished the operating crew for the derrick. The actual work of hooking up these beams to the derrick's falls was performed under the direction and supervision of defendant Kiewit.

Kiewit actually hooked the beams onto the derrick's falls. Now, this hookup included a gigantic steel beam which is about as long as these concrete beams, which had arms projecting from either end, and those arms were movable back and forth along the steel beam to adjust to different sizes of concrete beams that were to be lifted, and this steel beam was in turn hooked onto the derrick's falls.

The procedure was to swing this lifting beam, which, incidentally, was furnished by Kiewit, over the concrete beam to be lifted, with these projecting arms adjusted so that they came down over certain wire loops which had been cast into the concrete beam for lifting purposes, so that the steel girder was brought down into place over these, was connected to those lifting loops in the concrete beam.

Then strain was taken on the falls not to actually lift but to tighten everything up. Then the concrete beams, which rested in a form of cradle on the scow, were loosened from the cradle.

As I understand it, there was no lashing over the top of the concrete beams, they were simply set down into wedge shaped forms in the supporting girders, and there was wooden sheathing or padding in there, and that was clamped tight, so it was necessary, or they did in any event, loosen up that clamping.

Then the signal was given by my first witness to the captain of the derrick. He said, "Captain, it's all yours."

That means it was in order for the captain to give his lifting engineer the signal to lift, and we don't need to go into the further placement of the beam, because the casualty in question happened at this period that I have been describing to your Honor, when the lifts commenced on this particular beam.

Now, those lifting loops were two loops at each end of the concrete beam, and they had been imbedded in the beam by the manufacturer who is the third party defendant, and they were manufactured down at Cape Charles, Virginia; they were placed on these same scows, towed up to Jamaica Bay; and then transferred by our derrick to the bridge. That was the procedure.

I think about 200 of these beams had been placed in a considerable period of time, and the job was nearing its end, when the concrete beam in question, which was numbered 2205 was placed in position for lifting to the bridge.

My first witness, Mr. Whelan, is the mate of the derrick, and his job was to go out on the scow and make sure that everything in connection with the hookup and release of the beam was in order. And when it was in order, then he would so notify the captain.

I believe that there was also a signalman from the defendant who also gave the signal to the captain.

The captain would not act until he got the clearance from his own mate. Now, in this case the testimony will be that everything went perfectly according to routine. Another beam had been taken off this barge and placed on the bridge, then the derrick came back into position to lift this particular beam, the hookup was made, Mr. Wehlan will testify that he checked the entire procedure, that the beam was free and ready for lifting, he told the captain it's all yours, the captain placed an additional strain on the beam to lift it.

Now, there is some doubt as to whether the beam actually was lifted off its bed. Mr. Wehlan did not see that, he is convinced that the beam actually did not rise.

I have other information, I think from one of defendants' witnesses, that maybe it came up a little. In any event, what happened was, suddenly the steel lifting loops on the beam broke at one end, then they broke, or pulled out of the concrete on the other end .

The barge with this strain on her falls, the derrick barge, was lifted over towards the scow to a considerable degree, and when this strain was released by the breaking of the loops the derrick righted itself, and that caused this steel lifting beam to swing in against the superstructure aft of the derrick and to damage it.

My other witness, Mr. Freelund, was an official of plaintiff, he came to the scene as soon as he could having been notified by telephone in the matter of an hour or two. He arranged for surveys to be made by all parties interested. They were made the next day.

The necessary repairs were determined,

temporary repairs were made on the spot within one or two days so that the derrick could complete the particular operation that she was working on.

In other words, lifting all the material that was ready at that time for her to lift. She was then towed away to the repair yard and permanent repairs were made. The cost of the temporary repairs and the permanent repairs, as I recall it without checking the papers, is $30,200.

In the preliminary papers that I submitted, I made an additional claim for tug hire, but on further digging into the records I found that the derrick would have been returned to Staten Island in any event as part of the contract, and that at a later time she would have been towed back. So, temporary repairs having been made I came to the conclusion that it was not proper to claim that towage, and I do not have the precise figures for towage from Staten Island Yard to the shipyard and back, so I have eliminated the towage from my claim. It is just the actual cost of repairs.

Mr. Freelund, whom I have mentioned, is a former official of the company, will testify as to the nature of the repairs and the costs thereof. That will be the plaintiff's case, your Honor.

THE COURT: All right. Now we will receive your exhibits. Did you furnish a list of your exhibits to the Court?

MR. FISH: I have, your Honor. I submitted that a week ago.

THE COURT: All right, let me see if I can find it in this file.

MR. FISH: I have an additional list here.

THE COURT: Here it is. I have found it.

All right, your first exhibit is a contract between the plaintiff and the defendant Peter Kiewit.

MR. FISH: I offer that in evidence, your Honor. I think there is no dispute in this, it is agreed.

THE COURT: Is there any objection to that?

MR. LYSAGHT: No objection, your Honor.

MR. GEEN: No objection.

THE COURT: Let it be received.

(Plaintiff's Exhibit 1 received in evidence.)

THE COURT: Next one.

MR. FISH: Next one is the contract between the defendant and the third party defendant. Again, that has been produced by all parties in this case, and there is no dispute as to that.

THE COURT: No objection?

MR. GEEN: No objection.

MR. LYSAGHT: No objection, your Honor.

THE COURT: It will be received.

(Plaintiff's Exhibit 2 received in Evidence.)

MR. FISH: The third is a damage report submitted by the master of the derrick barge. Mr. Freelund will testify that that report was made in the ordinary and usual course of business. It is a business record. I will identify it further through Mr. Freelund. You have got copies of everything I have here. (Handing).

MR. LYSAGHT: With your Honor's permission, may we both look at this at the same time?

THE COURT: All right. He says you both have copies.

MR. GEEN: I wasn't given a copy.

MR. FISH: It was produced at discovery proceedings and copies were sent to both of you. For your Honor's convenience, I should have filed it before; I thought of it in the -- when I was putting these things together to bring them down this morning. I will be glad to furnish you with a typewritten copy of this which may be a little bit more legible than the actual document.

THE COURT: All right. Let's see what the objections are, if any.

MR. LYSAGHT: No objection, your Honor.

MR. GEEN: No objection.

THE COURT: All right. Received.

(Plaintiff's Exhibit 3 received in evidence.)

MR. FISH: Exhibit 4 consists of two colored photographs of the broken lifting loops. One shows the lifting loops at one end, one at the other.

I have marked these two photographs on the back "A" and "B". I offer these as one exhibit. My witnesses will testify that that is a fair representation of what they saw on the beam after the accident.

THE COURT: Well, they will be marked here as Plaintiff's Exhibit No. 4. Two of them together.

MR. FISH: Yes, your Honor, I have put them in an envelope.

THE COURT: All right. Is there any objection?

MR. LYSAGHT: No objection, your Honor.

MR. GEEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 4 received in evidence.)

MR. FISH: Plaintiff's Exhibit 5 is a survey report of "A". Holm Andersen, acting by A. W. Wolfe. Mr. Wolfe was the surveyor called in by the plaintiff.

This is a record of the survey that was held, it shows the people that were in attendance, the damage found, the repairs recommended and the figures agreed with the shipyard.

Attached to it as part of the report is the preliminary draft of survey which was signed by Mr. Freelund. That will be identified further by Mr. Freelund, but he will confirm all statements of fact made therein.

MR. GEEN: To this I object, your Honor. The best evidence will be the testimony of the witness and his opinion as to the damage and reasonable coarse of repair, and not the report.

THE COURT: Do you have any objection?

MR. LYSAGHT: Well, your Honor, I would have no objection if it were marked for identification to refresh the witness' recollection.

MR. GEEN: He is offering it in evidence. I am sorry, was that offered in evidence?

THE COURT: Yes.

MR. FISH: Yes, I said I offer it in evidence. I do not press the offer at this time if you object to it.

MR. GEEN: Thank you. I do.

THE COURT: All right, the claim being that the witness will testify and therefore his report is unnecessary; is that it?

MR. FISH: This is a record of the details used to refresh his recollection.

THE COURT: All right. Let it be marked then for identification.

(Plaintiff's Exhibit 5 marked for identification.)

MR. FISH: Exhibit 6, the company's copies of paid invoices of the shipyard for the temporary repair and for the permanent repairs. The permanent repairs being stated to have been made in accordance with the specifications in Exhibit 5.

THE COURT: Is there an objection to the Defendant's Exhibit No. 6, the invoices?

MR. LYSAGHT: Well, your Honor, if we may, could we have that marked for identification, too, so that the witness can identify it, then we could --

THE COURT: All right.

(Plaintiff's Exhibit 6 marked for identification.)

MR. FISH: I have not discussed the law of the case in my opening. I assume that --

THE COURT: Well, yes, we will take that at the end.

MR. FISH: That is Plaintiff's preliminary presentation, your Honor.

THE COURT: All right. Mr. Lysaght.

MR. LYSAGHT: With your Honor's permission, I would be repeating, and I don't wish to repeat, much of what Mr. Fish has stated. My client, Peter Kiewit - Slattery, had retained the services of the barge, Century, to lift certain beams and place them on the Cross Bay Bridge which was under construction. We purchased these beams, ma'am, from the third party defendant who is also a defendant, because the plaintiff amended their complaint to include them as a defendant. We purchased them from Bay Shore, which was situated down in Cape Charles, Virginia.

These beams in question as described by Mr. Fish contain certain devices. They were transported up to New York by scow. At the time this particular incident happened, on April 21, 1970, and may I repeat, your Honor, the beams were purchased pursuant to a contract which had been introduced into evidence, I believe, as Plaintiff's Exhibit No. 2, between my client, Peter Kiewit - Slattery and Bayshore.

As I state, your Honor, the beams were brought up to New York. At the time of the incident in question there were two of what I would call vessels. One was the derrick Century which contained a large lifting device which would lift these beams off the scow in question.

THE COURT: That was owned by the plaintiff; is that it?

MR. LYSAGHT: All by the plaintiff, yes. I can't disagree with what Mr. Fish stated. The Century was manned by the personnel of Raymond, and they had a mate on the scow and my client employed a Mr. Jess E. Comer who will be here to testify together with certain iron workers.

The lifting device contained a large beam with members which were locked into these eyes, and as Mr. Fish stated, I believe some 200 or 300, I forget the exact number of beams, had been successfully lifted by this particular barge, and then transported up to the bridge, placed in position and returned.

At the time this accident occurred, as Mr. Fish stated, the hooks were placed in position and strain was placed on them, and suddenly one of these I's, or lifting devices on the beam which was to be lifted broke causing consequent stress and a separation of the lifting device which in turn swung back and it did damage to the barge Century.

The position of my client is this, your Honor: That we purchased these beams from Bayshore, the third party defendant, which in turn had them manufactured and the lifting devices placed, and initially we denied the allegations of the plaintiff's complaint as far as any wrongdoing on our part was concerned and brought an action over as against the third party defendant, Bayshore, claim indemnification, because they manufactured the beams in question.

As a result of this, your Honor, my clients were no longer able to continue to lift these large beams in the manner which they had been doing, because there was fear that some more of these lifting devices might be defective and might part.

Consequently, my client was put to additional expenses of drilling holes into the concrete beams, lifting additional straps and transporting them that way. There was consequent loss of time and the expenditure of additional labor which is in the approximate of $35,000 or $40,000.

We in turn then, your Honor, instituted a further action claiming that amount in damages as against the third party defendant, Bayshore, and that is a brief outline of our case, your Honor.

THE COURT: All right. Do you have a list of your exhibits?

MR. LYSAGHT: Yes, ma'am. My first exhibit, your Honor, is the material contract between Bayshore Products and Peter Kiewit. I believe that has already been placed into evidence by the plaintiff as Plaintiff's Exhibit No. 2?

THE COURT: Yes. Well, we won't need another, will we ?

MR. LYSAGHT: No, ma'am. Exhibit B, your Honor, contains the worksheet which will be testified to by Mr. Jerry Ratner, who was in charge of the additional work which was -- which had to be performed as a result of this parting of the lifting hook.

Mr. Ratner drew these worksheets up himself, and I would prefer at this time if I may, your Honor, to have it marked for identification as Defendant's Exhibit B, Defendant Kiewit's Exhibit B, and after Mr. Ratner testifies to the facts contained therein, I can at that time introduce it into evidence, your Honor.

THE COURT: All right.

(Defendant Kiewit Exhibit B marked for identification.)

MR. LYSAGHT: Now, your Honor, I have

certain snapshots, colored snapshots, which I labelled individually, your Honor, Exhibits C and D and they constitute shots of the lifting devices which parted.

THE COURT: Well, how do we distinguish between C and D? Should they all be marked as one exhibit, Defendant's Exhibit C?

MR. LYSAGHT: I had marked them, labelled them individually, your Honor. I took the liberty of attaching the exhibit tags which the Clerk had furnished us with.

THE COURT: Well, what are the numbers on those?

MR. LYSAGHT: This is Exhibit C, your Honor.

THE COURT: Is there more than one exhibit marked as C?

MR. LYSAGHT: No, your Honor.

THE COURT: I see. All right.

MR. FISH: If your Honor please, on these photographs I suggest that they all be marked for identification, because Exhibit C to my eye shows the holes that were drilled in the beam subsequently for the new straps that were put on.

MR. LYSAGHT: That's right, your Honor.

MR. FISH: And I think it would probably be better to have each of them identified by the witness. So I suggest they be marked for identification.

THE COURT: All right.

(Defendant Kiewit Exhibit C and D marked for identification.)

MR. LYSAGHT: I might state, your Honor, that the balance of my snapshots were all taken understandably after the incident occurred in order to give us an idea of what it looked like, and also the work which had to be performed.

THE COURT: Well, how are they marked is what I was getting at.

MR. LYSAGHT: Defendant's Kiewit's Exhibit E is --

THE COURT: I see, the rest of these are all snapshots then; is that right?

MR. LYSAGHT: Yes, your Honor.

THE COURT: All right.

MR. LYSAGHT: It is a view of certain of the beams --

THE COURT: All right. Well, let them all be marked for identification and the witness can explain. All right.

MR. LYSAGHT: Shall I hand them over to the

Clerk, your Honor?

THE COURT: Yes.

(Defendant Kiewit's Exhibits E through L inclusive marked for identification.)

MR. LYSAGHT: With your Honor's permission.

THE COURT: All right. Mr. Geen?

MR. GEEN: If it please the Court, Bayshore Concrete Products was the manufacturer of the pre-cast concrete pier T-205 in question here. Delivery of that pier, or girder, which is sometimes referred to, was made down in Cape Charles. Thereafter, its transportation to New York, its lifting, its handling, were all out of their hands and the responsibility of Peter Kiewit and not Bayshore.

Now, everybody has agreed, and there is no dispute, that 200 of these concrete girders which may have varied a foot or so, but substantially were all the same in character, had previously been lifted by the use of these loops satisfactorily. There isn't any question from the investigation that this incident occurred and for some reason loops on this particular girder broke. No particular defect in these loops had been claimed in the opening statement of either the plaintiff or the defendant, merely the fact that in this case they broke.

Besides the fact that 200 of these piers had been lifted with these exact same type of loops.

The proof will show from the engineer involved in designing this that as far as the engineering loads involved for the lifting of this 130 pound pre-cast concrete girder the --

MR. FISH: 130 tons.

MR. GEEN: Did I say pounds? I am sorry, I meant 130 tons.

The lifting loops were more than adequate and had a large safety factor built into it. That the particular loops involved had the required ductility and elasticity and was perfectly adequate for doing this job.

However, the proof will also show, Number One, that the means of lifting this pier is Cape Charles by Bayshore was substantially different than the means used at the time of the accident. An entirely different type of machinery, apparatus was used, and let me very briefly explain what I am referring to.

The apparatus used down in Cape Charles which was discussed with Peter Kiewit and representatives of Peter Kiewit saw at the time that they visited Cape Charles had individual lifting members that lifted each individual loop and was so designed that it had an equalizer, because these loops were not perfectly even. So that when in lifting one loop would not take all the weight, if it wasn't exactly the same side initially, they had the individual lifting members one on each loop which had built-in equalizers so that it would balance, and all four loops would be lifted at the same time.

The machinery used to lift the loops at the time of the accident involved a pin passing through two loops, and the diameter of that pin is important because it was a rather narrow pin which had the effect of causing a notch effect on the steel loops, and did not have the same equalizing effect because they were lifting two loops at the same time.

THE COURT: How many loops were involved on each of these girders?

MR. GEEN: Four. Two at each end.

THE COURT: You say this pin passed through two loops?

MR. GEEN: Through the two loops on on end.

THE COURT: I see.

MR. GEEN: Now, moreover, when this was shipped for purposes of securing it during shipment after the piers were loaded on Cape Charles among the -- fitted into the girder supports, there was a block that was wedged by a vise type operation at four points, two on the front, on either side in front of the beam, and two toward the rear, and it was clamped securely, these blocks, up against these beams.

Prior to these beams being lifted off the scow at their destination it was necessary and it was a good practice that these wooden blocks be removed so that the beam when it is being lifted is lifted up unencumbered and not being held in a vice-like hold putting an enormous strain on the loops that they were never intended to carry.

The evidence will show that these blocks were not removed, and that one, I believe, was [illegible] even loosened. I think that one was loosened and it was about 3/8 of an inch, the wooden block, away from the concrete girder at the time it was lifted.

At the time of lifting this scow was listing, because a tremendous weight was being taken off one side. I think it listed to such a point that the top of the scow was at waterline, and these blocks were now wedged and this concrete girder was being attempted to be pulled up through these blocks, and that any failure here was not due to any defect in manufacture which I haven't heard anything about, or any defect in the loops, but in the manner in which the mechanism and the manner in which this was being lifted. Not the responsibility of the defendant. Moreover --

THE COURT: Did one of these loops actually break?

MR. GEEN: All of them broke on this particular girder.

THE COURT: All four?

MR. GEEN: Yes, ma'am.

Now, there is one other point I want to comment about, and that is I want to address it specifically to the claim of the defendant against the third party defendant.

He stated that thereafter they did not utilize the loops on these remaining piers, that they went ahead and --

THE COURT: When you refer to these as piers, I think it gets confusing. Are you still talking about the --

MR. GEEN: Piers, girders.

THE COURT: Well, let's stick with girders. Because "pier" is something we all think of as something you walk onto to get from the shore out to the water.

Let's call them girders.

MR. GEEN: All right, your Honor.

That they thereafter drilled through the concrete girders the holes to put cable and straps for lifting. Now, after lifting 200 of these girders into place prior to this incident I submit that their determination to thereafter not use these cables, these lifting loops, and to try to charge the expense based on their decision not to use them any longer against the third party defendant has basis either in fact or in law.

I don't believe I have given your Honor a copy of my exhibits before. (Handing.)

THE COURT: A list of your exhibits.

MR. GEEN: A list.

THE COURT: All right. They all consist of photographs?

MR. GEEN: No, your Honor. What I have done is I assumed that Mr. Fish would use numerical identification and that Mr. Lysaght would use letter identification, so for all my exhibits I used Roman numerals.

THE COURT: All right.

MR. GEEN: And the first seven exhibits are photographs approximately 3 by 5-1/2 colored photographs, and I have marked them Bayshore Exhibits 1 through 7.

THE COURT: Do you have the labels on them?

MR. GEEN: Yes, I have them [illegible] the back, your Honor. I marked them on the back.

THE COURT: All right.

MR. GEEN: I offer them in evidence.

MR. LYSAGHT: If your Honor please, may I just take a look?

THE COURT: Yes.

MR. FISH: I suggest we mark them for identification again, your Honor.

THE COURT: All right. Let's mark them all for identification. Just consider them marked for identification, then when they are received you can mark them, Mr. Clerk.

(Defendant Bayshore Exhibits I through VII marked for identification.)

MR. GEEN: Exhibits VIII through XVII, your Honor, are all photographs also, but they are 8 by 10 black and white, and I have marked them the same way, as Bayshore Exhibits VIII for identification through Bayshore Exhibit XVII for identification.

THE COURT: All right.

(Defendant Bayshore Exhibits VIII through XVII marked for identification.)

THE COURT: Is that XVII or XVIII? Because you have an Exhibit XVIII listed here as a photograph.

MR. GEEN: XVIII, your Honor.

(Defendant Bayshore Exhibit XVIII marked for identification.)

MR. GEEN: Exhibit XIX is a plan to show the support for the girders on the scow.

THE COURT: Is there going to be any objection to that?

MR. FISH: You say this is the actual construction that was used?

MR. GEEN: There were five on this scow, but this shows the type of construction. There are three here, five in all. I am going to offer an exhibit showing how it was set up on the scow.

MR. LYSAGHT: With your Honor's position, for identification?

THE COURT: All right.

(Defendant Bayshore Exhibit XIX marked for identification.)

MR. GEEN: That is marked third party defendant Bayshore Exhibit No. XIX for identification.

I have marked Bayshore Exhibit No. XX for identification, a drawing of the system used for securing the individual system for each individual girder used for securing the girder to the scow.

THE COURT: All right.

MR. GEEN: And Bayshore Exhibit No. XXI marked for identification is a drawing from an end view of the scow showing how the scow was loaded and the position of the girders on the particular scow containing the particular girder in question.

(Defendant Bayshore Exhibits XX and XXI marked for identification.)

THE COURT: All right, the plaintiff may proceed by calling its first witness.

MR. FISH: Before I do that, your Honor, I would like to introduce into the record the Plaintiff's Interrogatories to Defendant and to third Party Defendant, and the Answers thereto.

I believe your Honor has that in the file.

THE COURT: All right .

MR. FISH: And for your Honor's convenience I have made a new draft in question and answer form so you won't have to move from one document back and forth.

THE COURT: All right. Thank you.

MR. FISH: I think your Honor has a pretty good idea of the equipment involved, but if your Honor would like to see it, I do not have a photograph of the derrick barge itself, I do have in the building specifications a photograph of the model which was made to determine the rating of this barge if you would like to see that without making it an exhibit I would be pleased to show it to you. Just to give you a general idea of the craft involved.

THE COURT: All right.

ANDREW WHELAN, called as a witness on behalf of the plaintiff, was first duly sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. FISH:

Q Where do you live, Mr. Whelan?

A 301 - 81st Street, Brooklyn.

Q Were you born in this country?

A No.

Q Where were you born?

A Norway.

Q Have you become a naturalized citizen?

A Yes.

Q When was that?

A It was before the War. I don't know when exactly it was. It was 1938, something like that.

MR. GEEN: I'm sorry, would you ask the witness to keep his voice up?

THE COURT: Yes, please speak up.

Q Speak up so everybody can --

A Yes, all right.

Q What has been the nature of your employment? What have you done for a living?

A I have been working on the Merritt Chapman derricks for 44 years, I believe. 44, something like that.

Q And Merritt Chapman is the predecessor company of Raymond International?

A Yes.

Q Raymond International took the fleet over from Merritt Chapman?

A That's right.

Q And you have worked for the -- first one company, then the other for something like 40 years?

A Yes.

Q In recent years, what was your position? What jobs did you have?

A Well, I was deck, and I was mate.

Q How long have you been mate on the derrick barges?

A About 25 years or more.

Q Have you on occasion acted as master of any of those barges?

A Yes, a couple of times.

Q What was the occasion for that?

A Well, the captain was somewhere else, or something like that, you know.

Q You acted as a relieving captain?

A Yes, that's right.

Q But your regular employment for 20 years or more has been as a mate?

A Yes.

Q Are you presently employed?

A No, I am retired.

Q When did you retire?

A Three years ago.

Q Were you working for Raymond in April of 1970?

A Yes.

Q What was your job?

A Mate.

Q On what ship?

A On the Century.

Q Do you recall when the Century was built?

A Yes.

Q When was that?

A Well, I don't know exactly what year it was, what year it was I don't know.

Q Do you know about how old that craft was?

A Well, about ten years old or more. It must be.

THE COURT: That is about 1970?

MR. FISH: Yes. I think we will ask Mr. Freelund the exact dates on that.

THE WITNESS: Yes, that's right.

Q How long before April of 1970 had you been the mate on the Century? How long had you been mate on the Century before this accident we're talking about?

A Four, five years, I believe.

Q You were thoroughly familiar with the Century at that time?

A Yes.

Q Will you tell us how long she was and how wide ?

A About 165 feet long and 60-some feet wide.

Q I assume that her freeboard varied from time to time depending on stores and ballast, but can you tell us what the average freeboard was? The height from the water to the rail of the derrick.

A Let's see. Well, there's a difference in the bow and the stern, you know. It's lower on the stern than the bow.

Q Well, say amid ships.

A Amid ships? Well, six, seven feet.

Q Where was your hoisting machinery? On the after end of the --

A After end of the derrick.

Q Was it inside a housing?

A Yes.

Q For lifting devices did this craft have a mast, or did it have a different structure?

A "A" frame.

Q "A" frame?

A Yes.

Q So, it was like an inverted "V" immediately forward of your after house?

A Yes.

Q Did it have another brace running from the top of that "A" frame back to the stern?

A Yes.

Q Your lifting boom, where was the heel, or the lower end of that?

A In the center of the -- in the front of the house. Around the center of the "A" frame.

Q How long was that lifting boom?

A Well, about 115 feet, around that.

Q Do you know how heavy a weight this craft could lift?

A Five hundred tons.

Q It was the biggest craft of its type in this area?

A Yes.

Q Did you have a single wire fall coming down from the boom to lift heavy weights, or did you have a many-part fall?

A Yes, that's right.

Q Many-part fall?

A About thirteen parts.

Q Thirteen wires?

A Yes.

Q Consisted of the main fall?

A Yes.

Q Were there additional falls attached to this boom?

A Yes, two more falls. One on each side of the main fall.

Q What was the purpose of having those extra falls on there?

A Well, sometimes we use three falls to hoist with.

Q Do you recall this operation of placing girders at the Cross Bay Bridge?

A Yes.

Q Do you remember the accident that counsel have been discussing here in Court this morning?

A Yes.

Q Were you present on the barge that day?

A Yes, I was on the barge.

Q You were present as a member of the crew of the derrick?

A Yes.

Q Who was captain of the derrick?

A William Hansen, he was captain there.

Q What has happened to him?

A Well, he died.

Q How long ago?

A A year ago or something.

Q So you are the surviving senior officer on the derrick?

A Yes.

Q Was there any system of signals for the operation of the lifting of the object?

A Yes.

Q Will you tell us how that worked?

A Well, it's what you call a bell handle with buttons on, and each button have for each fall, or for swinging you have a button to swing the boom sideways and a button for the -- to top the boom off and to go ahead and to run the fall.

THE COURT: To what?

MR. FISH: A button to operate the falls to go up and down.

Q Is that right?

A Yes.

Q Was this a permanent position, or was it portable, this signal board that you referred to?

A Yes, it was a piece of wood like this here, [indicating] with buttons in, that's all, and you hang down a cable from there into the engine room, and in the engine room you have bells in there, make different sounds for each fall.

Q So whoever was operating this signal board could walk around on the deck of the derrick taking the signal board with him?

A Oh, yes.

Q Who operated that on this morning of the casualty?

A The captain.

Q Do you recall the particular lift which broke free?

A Yes.

Q Where was the captain standing on the derrick when this took place?

A He was standing on the side close to the scow. In front of the house. In front of the house of the derrick. Yes. And then he can see everything from there.

Q Could the engineer who was operating the engine see what was going on out on the scow?

A Yes, he could see, too.

Q How was the scow held in position alongside the derrick?

A With a rope .

Q How many?

A Well, usually have headline and sternline and breastline and another breastline.

Q Coming back to this particular T-205, what was the status, or the condition of those lines between the derrick and the barge?

A Well, we had a little slack in it, we didn't hold them in jammed tight, you know, we have them a little loose.

Q Why do you do that?

A So the scow could move freely.

Q In and out? In and out from the --

A Yes. From the derrick and to the derrick.

Q When your boom is swung out over the scow, what is it pretty nearly at right angles to the derrick?

A Yes. Yes.

Q About what angle would that boom be in picking up the offshore girder?

A Well, we got to keep the boom clear, that A frame going there in front, so we keep it like this in front of the house, like this [indicating], clear the leg of the A frame there, keep it like this [indicating].

Q Your boom isn't exactly at right angles, it's a little forward of the right angle?

A That's right.

Q So as it swung from the head to the side, it won't come back and hit the A frame?

A That's right.

Q Now, your boom must have been over at some kind of an angle?

A Oh, yes.

Q What was that angle?

A Well, it all depends on the fall, what fall in the scow you go.

Q If you're picking up the far beam on the scow, the furthest one out, what would your angle be?

A Well, the width of the scow had to be over thirty feet, or close to thirty feet.

Q Well, it had to reach more than thirty feet.

A Yes. Yes.

Q And you don't know the exact angle of the boom?

A No. No.

Q When a strain is taken on the boom, what happens? What happens to the derrick?

A Well, the scow plumb up with the fall. The scow moves in and out with the fall, you know. You set the fall tight, the scow be right plumb, right up and down.

MR. LYSAGHT: With your Honor's permission, forgive me, your Honor. I am not that familiar with nautical terms. Could we have a definition of what a fall is? I have heard the phrase used about three or four times.

THE COURT: All right. We will let the witness tell us what a fall is.

MR. FISH: Off the record a minute, your Honor.

THE COURT: Off the record.

[Discussion off the record.]

THE COURT: On the record.

MR. LYSAGHT: Thank you, your Honor.

THE COURT: All right.

MR. LYSAGHT: Thank you, Mr. Fish.

BY MR. FISH:

Q Does the derrick tend to tilt, or list when you take a weight, a liftout in the end of the boom out to the side of the ship?

A Yes. There is a list and it goes over, yes.

THE COURT: I don't understand that. It goes over which way?

THE WITNESS: Toward the scow. The A frame and everything lists over, everything.

THE COURT: I see.

Q Do I understand you to say that with that strain that the skow comes out underneath --

A That's right. Plumbs right up.

Q [continuing] -- so that your fall is vertical?

A Yes.

Q Did you have those two additional falls rigged that day? Were they on the boom?

A They are on the boom, yes.

Q Were you using them?

A No.

Q Were they hanging free?

A They were hanging free.

Q What happens when your main fall is out of vertical, if it should get out of plumb? What happens to the other two falls?

A Well, they will hang separate away then.

Q Well, could you tell whether they were away or alongside of the main fall?

A Yes, then you can tell if the main fall is plumb or not.

Q So that whether these additional falls are lined snug alongside will tell you whether or not the main fall is plumb?

A That's right. If them three falls is hanging together, then it's plumb.

Q In your experience can you tell by observing what is going on the approximate weight or strain upon your main fall when tension is taken on it? Can you tell how much of a weight she is trying to lift?

A Oh, yes. You can tell how much the derrick lists, you can always tell how much the derrick lists, and then the scow goes away from the derrick and then it goes away four, five feet, then you stop going ahead, then you top up the boom up. And the scow plumb up all the time till he gets close to the derrick, but not up against the derrick. Keep him clear of the derrick.

Q That is your usual method of operation --

A Yes.

Q [continuing] -- on this job?

A Yes.

Q Is that what happened this morning?

A Yes, that's right.

Q What was your job on the scow?

A My job was on the scow to see the beam was hooked up right and the clamps, or the shorings were taken loose between the beams. And then when the beam comes up, start to come up, then I holler to the captain, "The beam is up, it's all yours now, the beam is up", and "All clear."

Q We are talking about T-205 now, the one where the loop subsequently broke?

A Yes.

Q Did you observe this steel girder being secured to the T-205?

A Yes.

Q Where were you when that was being done?

A Well, I was on that end that he connect up there and then I walked through, in between the beams, the northern end, and I left on that and then it was all hooked up, the right hookup. That was my job.

Q You saw that it was hooked up?

A Yes.

Q Was it hooked up properly?

A Yes.

Q Was there any question of this lifting engagement device which Mr. Geen has described coming against only one loop?

A No.

Q Was there a pin put through there?

A Well, there is two arms coming down, and there are two pins, one go through here and one there. [Indicating.]

Q One at each end of your lifting --

A Yes.

Q One arm at each end of the girder?

A Yes.

Q And a pin for each arm?

A Yes. And they tighten up there and tighten them up there. [Indicating.]

Q So those pins are put through the two loops?

A Yes.

Q How close together were those two loops?

A Well, they were that far apart. [Indicating.] -- not that far, like that far apart. [Indicating].

Q I would judge that to be about nine inches.

MR. FISH: Counsel, would you say so?

THE WITNESS: Yes, like that. [Indicating.]

THE COURT: Do you want to hold your hands up again so that they can see how far your hands are apart.

Q Show me with your hands as you just did, how far apart those loops were.

A Well, exactly I couldn't tell exactly how far apart, but it wasn't far apart. I would say they were that far apart, because one come down here and one come down here and connect up. [Indicating.]

MR. LYSAGHT: With your Honor's permission, the witness is holding up his hands and I would estimate the distance is approximately a foot.

THE COURT: All right.

Q You saw that hookup made?

A Yes.

Q Then what happened? What was done next?

A Well, then what happened, the iron workers, they hooked it up, and then they hollered to the captain to go ahead on it.

THE COURT: The iron workers hooked it up?

THE WITNESS: They hooked it up, yes.

Q Did the captain come ahead?

A Then he went ahead.

Q Then what happened?

A Then he went ahead, but -- ten, twenty ton, something like that and then he stopped. Then the dock builders, they took the clamps off in between what the girder was into.

Q The "T" beam was sitting into a sort of steel cradle with a notch in it?

A Yes, a cradle, like a "V" shape like this. [Indicating].

Q Were there any lashings over the "T" beam, the concrete beam?

A On top of the beam? No.

Q HOw were the beams held in that "V"?

A Well, they had two clamps. On one end it sat on a beam, to that "V" shape, then they hold them tight in there and two on this end and two on the other end of the beam.

Q Is there anything between the end of the screw of the clamp and the concrete beam? Was there any timber in there?

A No.

Q No chocking?

A No, I don't know as far anyone had the --

Q Did you have a steel --

A Like a steel plate fitting in there, like, then they tighten them up or loosen them up, tight in there.

Q And at the start of the operation they were tight?

A Yes.

Q Then you said that the captain took a strain of about 20 or 30 tons?

A Yes.

Q Then what happened? Did you tell us what happened then?

A Yes. Then they took all the shorings off, I mean in between, and they went through from one side, in between, and made sure everything was going there and everything was going here, and they was all freed and then he went ahead.

Q What did you do?

A I was standing on one end facing the bow of the derrick so I could see the captain.

Q Did you say anything to the captain?

A No, I said "Go ahead now, everything is yours now, go ahead." And then he's booming up, keep the scow clear of the derrick all the time and, well, around a hundred ton or more or something and everything went, that's all I know.

Q Did you go overboard?

A No, but it went so fast.

Q I found that the collision lookout is usually heading aft in a hurry somewhere. Did you have any place to go?

A No, I was right up there. There wasn't much space there.

Q Did anything hit you?

A No.

Q What happened to this steel lifting beam that had been attached to the girder?

A Well, when he let go the derrick, the derrick was listing over toward the beam this way, [indicating], the "A" frame was listing over the derrick and the "A" frame and everything was listing over, and when he let go the derrick and "A" frame and everything went over this way and the steel beam come right in and -- so fast,you know, usually like lightening, like that. [Indicating.]

Q You made some motions demonstrating what happened. As I understand it from your motions the derrick had been listed over to starboard, and when this thing let go, she rolled upright and went a little over to port?

A Yes.

Q And this caused this lifting gear to swing in and hit the afterhouse?

A That's right.

MR. FISH: Your witness. Excuse me, I would like to have the photographs, if I may, please.

Q After this happened, did you look at the top of the beam and the lifting loops?

A Yes. Oh, yes. On the concrete beam. Yes. Yes.

Q I show you two photographs, I think you have seen these before, haven't you, captain?

A Yes.

Q Are these fair representations of what you saw as to the condition at the top of the beam and the lifting loops after the casualty?

A What do you mean --

Q Is that the way it was?

A Yes. Yes.

Q It is a fair representation, that is the way a lawyer would say it.

A Yes.

Q Did you notice any particular color on the loops, the broken ends of them anywhere?

A Yes. Down to the cement it's all rusted, the wire.

Q The wire in the cement?

A Yes. Going in through the cement it was all rusted.

Q Does that show in these photographs?

A It should. Yes. It shows there.

MR. FISH: I now offer these in evidence, your Honor.

THE COURT: All right. Is there any objection now to these photographs? I thought we had previously received them.

MR. FISH: Not the photographs, your HOnor.

THE COURT: Not the photographs?

MR. FISH: Oh, I think they were received, your Honor. I think they were.

THE COURT: All right.

MR. FISH: That is all.

CROSS-EXAMINATION

BY MR. LYSAGHT:

Q As I understand it, Mr. Whelan, the boom of the derrick was positioned over the scow;is that correct, sir?

A Yes.

Q And there was a certain lifting beam which was attached to the derrick boom; is that correct, sir?

A Yes.

Q And you were aboard the scow; is that right?

A Yes.

Q Do you recall Mr. Jess Comer being there as well?

A Yes, I do. I know him.

Q Now, sir, as I understand from your testimony, you could observe whether the, I believe you called them the falls, were vertical or plumb; is that correct?

A Yes.

Q And by falls, you mean some type of wire device which is attached to the lifting beam?

A Oh, yes. Yes, that's right.

Q And the lifting beam itself, Mr. Whelan, that had two straps to attach --

A That's right, yes.

Q I show you Defendant Kiewit's Exhibit G marked for identification, and I ask you, does that fairly and accurately represent a view of one portion of the end of the lifting beam? [Handing.]

A That's right.

Q What would you call those two objects that are extending from that end?

A Down there, you mean? [Indicating]

Q Yes.

A Two connecting plates we call them. Connecting plates. They connect into the loops, and they fasten to the beam up there.

MR. LYSAGHT: May I offer that in evidence, your Honor?

THE COURT: All right. Is there any objection to that?

MR. FISH: No.

THE COURT: All right, let it be received. Defendant Kiewit's Exhibit G is received in evidence.

[Defendant Kiewit Exhibit G received in evidence.]

BY MR. LYSAGHT:

Q Am I correct, Mr. Whelan, that the two lifting straps which are attached to the lifting beam as shown in Defendant Kiewit's Exhibit G in evidence fitted into the lifting straps which are embedded into the girder --

A Yes.

Q [continuing] -- as shown on Plaintiff's Exhibit 4 designated "A" and "B"; is that correct?

A Yes.

THE COURT: The lifting hooks embedded in the girder?

MR. LYSAGHT: Yes, ma'am.

THE WITNESS: Two pins, there's one pin for each strap.

THE COURT: One pin for each strap?

THE WITNESS: Yes.

THE COURT: What does that mean? One of those --

MR. LYSAGHT: That is what I want to find out, your Honor.

Q Would you describe --

A Well, instead of one pin go through two of them, there's two pins. Like here, [indicating], one pin goes through here and one pin goes through there. [indicating]

Q What I'm trying to find out is this, sir: These lifting loops that were embedded into the concrete, they looped like, if I could use a bad analogy, the top of a hairpin; is that right?

A That's right.

Q And there were two of them positioned next to each other; is that correct?

A Yes.

Q About how far apart were these, sir?

A Well, I would say something like that. [Indicating]. I'm -- not exactly.

Q I think you indicated before about a foot or nine inches?

A Yes, something like that.

Q Now, these two straps were attached to the lifting beam came down; is that right?

A Yes.

Q And these two straps had two hooks?

A Yes.

Q Now, if we could take one hook at a time, one of those hooks would go into that lifting device which was embedded into the beam which looked the head of a hairpin?

A Well, it's like this, and it goes right over the wire like that. [Indicating], and you put a pin through. And there's another one there, and you do the same thing, put a pin through.

Q Where would you put the pin through?

A In that arm coming down there's a hole in there.

Q A hole in what, sir?

A In that hoisting -- the plate coming down. Don't you have it on the picture there?

Q Do I understand, Mr. Whelan, and directing your attention to this one strap, let's say that comes down --

A The two come down together. The two of them come down always together.

Q I appreciate that. What is the --

A One of the arms come down and come here, and the other one goes here. [Indicating].

Q Into each individual loop?

A Yes. And there's an individual pin here and one here. [Indicating] And --

Q Now, bear with me a moment, Mr. Whelan. I don't quite know what you're talking about, so if we could take it step-by-step. It's not your fault, it's my fault.

A No, that's all right.

Q What was at the end of this strap that came down? Was it a hook or a plate of some type?

A It was an arm and then an opening, like a connecting plate like this, too. [Indicating]. And then with a hole in here and a hole there [indicating] and go right through.

MR. LYSAGHT: With your Honor's permission, could we ask Mr. Whelan to draw a picture of what he is describing?

THE WITNESS: Well, don't you have a picture there? You can see right there.

THE COURT: Could I see that? What exhibit is that? Defendant's Exhibit G. All right.

Q Mr. Whelan, if I could with Mr. Fish' permission use the handle on his briefcase as an example of one of the lifting devices, the strap that came down, did that have two plates on each end?

A No, there's one plate, but then it comes like this. [Indicating.]

Q All right. Indicating that this one plate comes down and forms an inverted "U".

A Yes, into two. And there's a hole in there, hole there, and another comes down here and it goes like this and a hole there. [Indicating.]

Q So that the --

A It's a different connection.

Q If this were one of the lifting straps, this plate which formed a "U" would be positioned about it; is that right?

A That's a big, heavy piece of steel like this coming down, and then it goes out like this, like this. [Indicating.] So that you got plenty material there and plenty there, and then there's a hole, a two-inch hole -- no, a little bigger than two-inch, and then you put the pin through there, you put a nut on it and the same thing here. [Indicating.]

Q So, the two plates are placed about the one loop and then a pin is inserted ; is that right?

A Yes.

Q Then on the other end you have the same thing; is that right?

A Same thing, yes. It's on the same end.

Q So that there is not one pin going through both?

A No, no. Two different.

THE COURT: And the pin was inserted by the iron workers, you said?

THE WITNESS: Well, the iron workers, they connect them up.

THE COURT: They put the pin in?

THE WITNESS: They put the pin in. But I'm on the end of the beam, so I can see them and I can see them so they have --

THE COURT: Now, I am asking you what you said before. Did you say before that the iron workers were the ones that tightened those?

THE WITNESS: Yes, they connected up.

THE COURT: All right.

BY MR. LYSACHT:

Q Let me direct your attention to this particular beam. Did the iron workers connect up the lifting device to both lifting straps on one end?

A Yes, and there's another gang on the other end of the beam, they connect up.

Q That is my next question. In other words, all four lifting devices were attached; is that correct, sir?

A Yes.

Q Where were you when they were attached?

Were you on the scow?

A I was on the end of the scow so I can see them, and then when they are finished there I go on other end of the scow and see when they get finished on that end and see that it's right.

Q In other words, you check the hookups?

A The connection. That's what my job is, was over there.

Q Sir, I believe you testified that when these particular girders were brought up there was something securing them?

A No.

Q Were there clamps? When they were positioned on this particular scow and before you would lift, did you describe certain clamps, sir?

A Yes. They were in between this "V" shape, hold that steel girder so it don't move, and then it was set tight, then we loosened them up and took them out of there.

Q In other words, Mr. Whelan, these clamps, or devices were "V" shaped type of object?

A Yes.

Q And the particular beam was resting between these "V" shaped clamps?

A Yes.

Q I believe you stated that after the lifting devices were attached to the lifting loops a strain was taken up on the fall?

A Yes. Yes, you had to take strain on it first.

Q And you estimated that strain to be about twenty ton?

A Yes, around twenty. The captain, he could -- when the derrick roll over a little bit you can tell that, too, you know.

Q In your forty years of experience as a mate, sir, and a deck hand, can you tell by the behavior of the derrick the particular weight that is being lifted?

A Yes.

Q You can?

A Oh, yes.

Q And that would be by the listing of the derrick?

A The listing of the derrick, yes.

Q And by "listing", you mean together from one end to the next; is that right?

A Yes.

Q So when that strain was taken up initially, that strain that you estimated to be about twenty tons, were these clamps still in place?

A Yes.

Q Now, after that, sir, were the clamps removed?

A Yes, they were all moved. I went in one end and checked, and there was dock builders mostly, dock builders on both ends working on it. Dock builders and iron workers, they work together on them.

Q Dock builders. In other words, sir, these dock builders would loosen these clamps that were holding the beam in place; is that correct?

A Yes.

THE COURT: Well, that was before you attempted to hoist it up?

THE WITNESS: Well, we set the fall tight, about ten, fifteen ton, something like that, to hold the beam steady. Then we took them shorings off, them clamps off altogether. Free. Then the beam was free and --

Q Please don't jump ahead of me if you will, Mr. Whelan.

In other words, you had these "V " shaped clamps that were holding the beams in place; is that correct?

A Yes.

Q And these "V" shaped clamps were still holding the beams in place when you took this initial strain of twenty ton?

A Yes. Maybe less than twenty ton, too .

Q Then when the strain was on the lifting device these clamps were taken away?

A Yes.

Q And that was done by dock builders, you said?

A Yes, the dock builders mostly did that.

Q After you had checked the connections with reference to lifting devices, did you then check to see if these girders or chocks were free?

A I went on both ends. I did it on every one of them. I was there till we finished the job.

Q Now, after that, sir, what happened?

A Well, then I hollered to him, you know, and the dock builder -- I mean the iron worker, the foreman, you know, he hollered to the captain, too, to go ahead, and I told him to go ahead.

Q Well, after you checked to see that the hooks were in proper place and that the chocks, the chocking was free, did you then make a signal to somebody?

A Yes, I told the captain the beam is all loose.

Q Now, sir, the captain was over on the barge; is that correct?

A On the derrick, yes.

Q And you hollered to him that the beam is all loose?

A All loose, yes.

Q Was the captain on the deck of the derrick?

A Yes, he was on the lower side, on the same side facing the scow. There he was standing, in front of the house there. And I was in the front of the scow, so I can see him and see the derrick how list she was.

Q Where was the operator of the derrick, sir?

A He's in the engine room. Up on the platform.

Q Was the scow visible to the operator of the derrick?

A Oh, yes. But they wasn't going ahead on his own, they listen to the captain, to the bell he gives.

Q Well, the captain I think you said had a board of some type with buttons on it; is that right?

A Yes, that's right.

Q After you shouted to the captain, what did he do then?

A Then he go ahead some more.

Q He what, sir?

A He go ahead some more to get the scow away from us a little more, and then he stopped, and then he give the bell for the -- to top the boom up.

Q In other words, he pressed the bell; is that what you are saying?

A Yes, to go ahead.

Q That was the signal to raise the boom; is that right?

A Yes.

Q Then, sir, I believe you stated when the signal was given and before the mishap occurred the derrick started to put additional strain by lifting the device; is that correct?

A That's right.

Q And when the lifting loop broke, you estimated that there was a tension of about a hundred ton --

A Yes, around a hundred ton or something. Maybe a little more, something like that.

Q And you could tell that based on --

A I could tell it on the derrick.

Q By the --

A By the list on the derrick.

Q And these objects, these beams, I believe weighed about 130 ton?

A Yes. Yes. Something around -- yes.

Q Now, when that "I" when it parted, or broke, I believe you stated then the lifting device started to swing free; is that correct?

A Yes.

Q Were the blocks removed before this operation was started?

MR. FISH: What blocks is that?

A What do you mean, what blocks?

Q Did you hear Mr. Geen in his opening statement state that there were wooden blocks which held a vise like strain on the girders?

A They were all free, everything was free between the girder and the "V" shape, they was all free, nothing in between. Because I walked through both side on all the beams and see they were all free.

MR. LYSAGHT: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. GEEN:

Q The question, sir, was: Were the blocks removed?

A If the blocks were removed?

Q Yes, sir.

A Yes, they were removed.

Q They were removed off their seat?

A Yes.

Q By the way, you told us about the pin that went through the lifting loop.

A Yes.

Q So if you were measuring from end to the other end, would you say it was about -- well, what would you say, this inverted "U", this is about eight inches high?

A Yes, that's all. There's one here and one there. [Indicating.]

Q I understand. I just want to know the length of one of these straps from one part of the concrete where it is imbedded to the other part of the concrete --

A I guess it's -- I don't know, like this. [Indicating].

Q You say about sixteen inches?

A Well, yes, the length of the wire. I guess so. I never measure it.

Q I know you didn't. I am asking you for your best approximation.

A Yes.

Q So this opening was about eight inches high, and the cable was about sixteen inches, and they were using a pin that was four inches in diameter; is that correct?

A Yes.

Q I'm sorry, did you say three inches?

MR. FISH: He said two, maybe three.

Q Two, maybe three inches?

A Yes, around there.

Q When Mr. Fish was asking you questions on direct examination he asked you about blocking. He asked you about this support that was screwed against the girder.

A Yes.

Q Do you remember his asking you that question?

A Yes.

Q Do you remember him asking you about wooden blocking?

A I don't remember any wooden blocking. They had the wrench to loosen them up.

Q Do you remember any wooden blocking being used in connection with this?

A No.

Q Do you understand what I mean by wooden blocking? A block of wood. A block of wood that was used in between the concrete girder and this vise like contraption that was used to pin it. You don't recall any such wooden blocks; is that correct, sir?

A No, I don't recall that. Because the dock builders, they had a wrench to loosen it up and took them out of there, and than they took that thing out of there.

Q My question is, sir, do you remember --

A Well, the beam was all clear on both sides.

Q I know you want to tell me that, but I am not asking you about that. I am asking you if you remember wooden blocking being used.

A No, I don't recall any wooden blocking.

Q Do you recall that there was anything attached to this vise like apparatus with a chain?

A Well, I don't know exactly whether you call it a chain or whatever it was, but the dock builders, they took it out of there and they loosened it up with a wrench and it was cleared on both sides, whatever it was.

Q I know you want to tell me that they loosened it up and they took it out, whatever it was, but what I want to find out,sir, is since you were there and you told us all about it, I want to find out what it was.

Now, my question is: Was there a chain attached to any part of this vise or anything between the vise and the girder?

A Maybe there was a chain attached to the clamps, they were hanging, they were loose if they took them out of there, I don't know nothing about that.

Q Didn't you say that you checked this thoroughly to --

A I started checking, there was nothing in between.

Q Let me finish my question.

Didn't you say you checked this thoroughly before you gave the captain the okay to lift this concrete girder?

A Yes.

Q Well, then, when you checked it thoroughly, did you see that there was a chain hanging down?

A There was a chain hanging down there. It wasn't around there where the beam was, it was all clear there.

Q Where was this chain attached to?

A I didn't see no chain.

Q You didn't see no chain?

A No, as far as I know.

Q Did you see the block of wood?

A No, I didn't recognize -- there was no wood there so far as I know.

Q You saw no blocks of wood?

A I saw they loosen up -- whatever was in between they loosened it up and took it out of there.

Q What did they do with it when they --

A Something shaped like this in between. [Indicating.]

Q You said they took something out?

A Yes.

Q Did they take out a block of wood?

A Well, they took out whatever it was. There was nothing there.

Q Look, I'm asking you, did you see, prior to --

MR. GEEN: Withdrawn.

Q Were you on this barge before the dock workers did anything, or the steel workers did anything, were you on this barge?

A Yes, sir, I was on the barge.

Q And you were there to supervise the unloading; is that right?

A Yes, I did.

Q Did you watch what they were doing? Did you see what they were doing?

A I saw what they were doing.

Q All right. Now, my question is: Did you see them remove any wooden blocking?

MR. FISH: Would you define wooden blocking, please?

Q A piece of wood in block shape that was between this vise like contraption you have described and the concrete girder.

A Well, whatever there was, they took everything out of there, it was all clear.

Q Now, sir, we are talking about what you saw. Now, you either saw it or you didn't see it. Did you see them remove any wooden blocking?

A Well, it could be wooden blocking, too. I don't know. But they took it out of there, whatever it was.

Q I'm not asking you what there could be. You told us before --

THE COURT: Excuse me. What was this support made of, this "V" shaped support? What was it made of?

MR. GEEN: The "V" shaped support was made of metal.

Q You told us that you observed them during this operation; is that correct?

A Yes.

Q All right. Now, you tell us exactly what did they do? What did you see them do? What was there and what did they do with it?

A Well, they took it out of there, that's all I could tell you.

MR. FISH: If your Honor please, I suggest this has been asked fifteen times and we are not getting any further along with it.

THE COURT: Yes, I think so.

MR. GEEN: Well, I think I am entitled to an answer. I think it is a perfectly proper question.

THE COURT: Well, he said before he didn't see any wooden blocking. Was that your testimony?

THE WITNESS: Yes.

THE COURT: All right. That is what Mr. Fish is referring to.

MR. GEEN: All right.

Q Therefore, you didn't see any chain attached to any wooden blocking because you didn't see any wooden blocking; is that correct?

A Well, like I say, if it was -- they took everything out of there.

THE COURT: Well, did you see a chain?

THE WITNESS: Well, maybe there was a chain hanging onto the "V" shape hanging there. I'm not sure about that. But I checked on it so there was nothing there.

Q I ask you, sir, that was your job and your responsibility; is that right?

A To see it was all clear, and I did look at it, it was all clear.

Q If you didn't do that --

A I did it.

Q Let me finish my question. And you didn't do it and something wrong happened, that would be your responsibility; is that right?

A Yes, that was my responsibility. I did it.

Q Now, you told me that since this was your responsibility you watched this operation.

A Yes.

Q From the beginning to the end; is that correct?

A Yes.

Q That was your responsibility. Okay? Is that right?

A That's right.

Q Now I only want you to tell me what you saw. Do you understand that? Not what you think, but what you saw.

I want you to tell me what you saw those workers do in regard to this metallic vise, or anything attached to it that was securing the girder.

A Well, it could be a little wood here and there, the dock builder took it out of there, whatever it was, and I checked on it, it was all clear on both sides and the beam let go, the strap let go a little more than a hundred ton, it let go.

MR. GEEN: I move to strike the answer as unresponsive.

THE COURT: Suppose you tell me what your theory is with respect to this. Because I don't know that it is relevant. Where were these hooks with relation to this wood, if you claim it was there in any event? It is not clear to me what you are getting at. Were the hooks on top of the beam away from those wooden blocks?

MR. GEEN: Maybe I can help, your Honor. May I proceed this way?

THE COURT: Yes.

Q I show you Defendant Bayshore Exhibit No. XX marked for identification, sir, and I ask you, is that a fair and accurate representation of the mechanisms used on both sides of the girder while it was on the scow to secure the girder? [Handing] Yes or no?

A If I checked that, you mean?

Q I didn't hear what you said, sir. Is that a fair diagram of what the mechanism looked like that secured the girder to the scow?

MR. LYSAGHT: Your Honor, has it been established that the witness can read the diagram?

MR. FISH: I have the same question, your Honor. Is this witness accustomed to reading drawings?

THE COURT: Well, he could tell us. Do you understand that drawing? Are you able to read diagrams?

THE WITNESS: Well, I don't understand much in here.

Q You don't understand what is there?

THE COURT: Are you accustomed to reading diagrams?

THE WITNESS: No.

MR. FISH: Then I would object to the question, your Honor.

Q Let me ask: This is a drawing of what existed, there is no plan here --

A That's right.

Q [continuing] -- and I ask you, does this drawing represent the mechanism that was on the scow to secure these girders?

MR. FISH: I will object again, your Honor.

THE COURT: Well, does that look like what was there, a drawing of what was there to secure the girders?

THE WITNESS: I don't see nothing there that I know of here. I don't know what this is -- I don't know what you are talking about. Where is the beam here, anyway?

MR. GEEN: All right.

Q I show you Defendant Bayshore Exhibit VII marked for identification, sir, and I ask you, sir, does that show the concrete girder and --

A Oh, yes, I recognize that there. Yes.

Q You do?

A Yes.

Q That's it, right?

A Yes, that's right.

Q Is that the one that failed?

A Yes, they took them out of there. I recognize that.

That's right.

Q Just listen to my question now, please.

Is that a picture of the girder that broke?

A Well, it's a picture of all the girders. I don't know what it is. But this is the one they tighten up.

Q Now you see the block?

A Yes.

Q Now you see the chain connecting the block?

A Yes, I see that now.

Q You see that now?

A Yes.

MR. GEEN: I offer it in evidence.

THE COURT: Does that have a number?

MR. GEEN: Yes, your Honor. Bayshore's Exhibit No. VII marked for identification.

THE COURT: That would be Roman numeral VII?

MR. GEEN: Roman numeral VII, yes, your Honor.

MR. FISH: Is that offered as a picture of T-205?

THE WITNESS: That's what he used the wrench on, and loosen up and take it out.

THE COURT: Just a minute. There is no question before you. The question was to counsel.

Mr. Geen, the question Mr. Fish put to you is:

Is this being offered as a representation of T-205?

MR. GEEN: At this time the witness couldn't identify it as T-205, but he said it was a typical -- he now remembers that it was a typical -- I don't want to misquote him --

THE COURT: Girder?

MR. GEEN: Girder.

MR. FISH: Arrangement. All right. I don't think he used that word, either, but I will accept that.

MR. LYSAGHT: With your Honor's permission, do I understand the offer of proof is that this Exhibit is solely to depict the block with a chain attached, attached to a girder in general?

THE COURT: Well, such as it was the case on the day of the incident; is that it?

MR. GEEN: Yes, ma'am.

MR. LYSAGHT: With your Honor's permission, if this is being offered as a view of the girder at the lift was being made, I would object to that. I don't think that has been established. I have no objection, your Honor --

THE COURT: Well, he agrees it has not been established. All right, may I see it?

It will be received.

[Defendant Bayshore Exhibit VII received in evidence.]

THE COURT: Excuse me, we are going to recess now until two o'clock for lunch. I have another matter at this time briefly.

The witness is excused until two o'clock for lunch.

[Luncheon recess.]

[Time noted: 12:50 p.m.]

AFTERNOON SESSION

[2:15 p.m.]

THE COURT: All right, Mr. Geen, you may proceed.

ANDREW WHELAN, resumed.

CROSS-EXAMINATION [continued]

BY MR. GEEN:

Q The exhibit that was marked in evidence before we went to lunch, Mr. Whelan, at the time of this occurrence all four loops broke; isn't that correct?

A Yes.

Q I want to show you some other photographs, Mr. Whelan, and we will take them one at a time.

I am now showing you Bayshore's I marked for identification, and I ask you to look at it, sir. [Handing.]

A Yes.

Q Does that show a portion of the typical girder and the securing of that girder that was on this barge?

MR. LYSAGHT: I will object to the form of the question, your Honor. If that relates to a typical type girder, or the girder in question.

MR. FISH: He said, "typical".

MR. GEEN: I am not asking about the particular girder in question, I am asking about a typical girder.

THE WITNESS: All right.

THE COURT: What do you mean, what is the difference between them you said?

MR. GEEN: No. No.

Q Does that show, this picture as you look at it--

A Yes.

Q [continuing] -- is that a fair representation of the way the girder and the --

A Yes. Yes. Okay. Yes.

MR. GEEN: I offer it into evidence.

MR. LYSAGHT: No objection, your Honor.

MR. FISH: No objection.

THE COURT: All right, it may be received.

[Defendant Bayshore Exhibit I received in evidence.]

THE COURT: Excuse me, the lifting hooks are on top; is that it?

MR. GEEN: That is correct, your Honor.

THE COURT: And away from this wooden block that you were trying to get the witness to talk about earlier?

MR. GEEN: Yes.

THE COURT: All right.

MR. FISH: If your Honor please, that clamping device is underneath this "T", this broad "T", you see down on the lower leg of the "T".

THE COURT: Yes, I see that. Well, I was trying to get at the relevance of why Mr. Geen wanted to bring out that wooden block with relation to the hooks themselves which were on top. All right.

BY MR. GEEN:

Q Mr. Whelan, I show you Bayshore Exhibit No. IV marked for identification, sir, and I ask you the same question. [Handing.]

Do you remember the question? Whether this shows the block, part of the girder and --

MR. FISH: On a typical instance.

MR. GEEN: Typical, I'm talking about a typical instance.

MR. FISH: He may not remember that.

A Oh, there it is, yes. The chain there, you mean. That's right, hanging on. Yes. And there's where you loosen up with the wrench, right? Is that where you loosen up -- is that the pin sticking out? I don't see it good here, anyway, what is there, anyway.

Q Yes, that is the pin.

A Yes, that's the pin. With the wrench you loosen it up.

Q I don't have the wrench in the picture, sir, but is this a --

A Yes, that's right.

MR. GEEN: I offer it in evidence.

THE WITNESS: That the one you use the wrench on.

MR. FISH: With the observation that that is obviously a subsequent picture on account of the hole in the top of the "T" there, I have no objection.

MR. LYSAGHT: No objection to its being a typical type girder, your Honor.

THE COURT: All right, that is No. II, is it?

MR. LYSAGHT: I believe that is No. IV, your Honor.

THE COURT: Roman numeral IV?

MR. GEEN: Roman numeral IV.

THE COURT: All right.

[Defendant Bayshore Exhibit IV received in evidence.]

BY MR. GEEN:

Q Now, sir, I show you Defendant Bayshore Exhibit No. XVII, Roman numeral XVII, marked for identification and I ask you if that shows the block, the wooden block and the portion of the apparatus used to secure the girder to the barge. [Handing.]

A Where is the --

Q Typical girder we are talking about.

A Yes. Where is the bolt that it tightens up -- there, is it right here? [Indicating] Well, it's a little different here the way I look at it. The nut where it slack up is all on this side, right?

Q That's right.

A Yes, that's right.

MR. GEEN: I offer it in evidence.

MR. LYSAGHT: Do I have your Honor's permission to look at these exhibits with Mr. Fish?

THE COURT: Yes, certainly. I was hoping you had looked at them before the trial.

MR. GEEN: They have.

THE COURT: No objection? Let it be received.

MR. FISH: No objection.

MR. LYSAGHT: No objection, your Honor.

MR. FISH: If your Honor please, we did have following the meeting in your office yesterday a conference out in the corridor, and we did have a chance to look at them generally. But we did not have the opportunity to examine each one in detail.

THE COURT: Well, it should have been done before trial.

BY MR. GEEN:

Q Now, sir, I show you Defendant Bayshore Exhibit No. XVI marked for identification, and I ask you the same question. [Handing.]

A This is the same thing, right.

Q Yes.

A And here is end of the bolt, right? [Indicating]

Q Yes, sir.

A Yes, that's right. That's the one it slacked up on.

MR. GEEN: I offer it in evidence.

MR. FISH: No objection.

MR. LYSAGHT: No objection.

THE COURT: All right.

[Defendant Bayshore Exhibit XVI received in evidence.]

BY MR. GEEN:

Q Sir, I ask you to take a look at Defendant Bayshore Exhibit No. XVI in evidence, and ask you to look at it. [Handing.]

Now, that block of wood, can you tell us in what manner, if any, it was attached to the vise like apparatus, or was it loose?

A Yes, I remember that block there. I remember the dock builders, they loosened up the nuts on there and they took that out, the shoring out.

Q All right. Now, that is what I am asking you. Are you telling us that all they would do is loosen it and then they just take the block out, the block of wood out?

A Well, it --

Q Is that all --

A Well, that --

Q No. Listen to my question, sir. My question is very simple: Are you telling us that all they would do is loosen it with a wrench and take the block out?

A They shoved the block out, they pushed the block out. I remember after they loosen it up there, they pushed the block out, and it fall down and hang down on that chain.

THE COURT: Just a moment. Mr. Whelan, when a lawyer gets up to object, please stop talking until I can hear the objection.

All right, do you have an objection?

MR. LYSAGHT: I will withdraw it, your Honor, because apparently in spite of the language barrier the witness did understand the question.

THE COURT: All right .

Q When you say they would push the block out, did they use any tools?

A They used a wrench to loosen up them bolts, yes.

Q Now, beside loosening up the bolts, did they use any other tools to remove the block?

A No, they pushed them down.

Q Were there any nails to be removed?

A Yes, these men, they had tools to work on, but I know they pushed them out, that's all I know of.

Q Didn't you watch this operation while it was going on?

A I watched to see it was clear so they went ahead on it.

THE COURT: Excuse me. Where were you standing when this operation was going on? On the derrick, or --

THE WITNESS: No, I was on the scow in between the beam. I watched them when they loosen it up. Both ends.

Q Let me ask you something, Mr. Whelan. Had you worked on the Century during the period of time when it was working on this bridge, next to this bridge?

A Yes.

Q Had you been on the Century and working with the Century during a period of time when hundreds of these girders had been lifted off?

A Yes. Every one of them.

Q So the day of this occurrence was not the first time that you saw girders lifted off; isn't that right?

A Well, it's over four years ago now, so I forgot most of the thing of it.

Q Mr. Whelan, why can't you answer my question? My question was: You had seen many, many hundreds of these girders removed before?

A I'm just telling you I saw every one of them.

Q And as a matter of fact, on this day of the occurrence before the four loops on this particular girder broke, two other girders had been lifted and put into place; isn't that right?

THE COURT: Four? Four other girders?

MR. FISH: Two.

MR. GEEN: Two.

THE COURT: Oh, two.

Q Did you hear my question?

A Two other girders were hoisted from the same scow, you mean?

Q Yes. Before this occurrence.

A Yes. Sure, they did.

Q During all this time that you had seen them lifting these girders, can you tell us whether or not they had to remove or they did remove nails from this blocking before they removed it?

A Well, all right, but they did, they loosened everything up. I walked around, it was all clear.

Q Is it fair to say, sir, that you don't know what they did to remove these blocks?

A I did.

Q After this occurrence did you remain on the scow?

A Yes.

Q Did you remain there the rest of the day?

A The rest of the day?

Q Yes.

A For what?

Q Were you there for the rest of the day on the scow after this occurrence?

A No, I -- after the strap let go nobody was on the scow then. There wasn't nothing to do on the scow then.

Q Everybody got off the scow?

A Yes.

Q So when these straps broke, what happened to the girder? Did it stay in the same place it was?

A The girder didn't lift up, the girder was on the scow. We didn't move the girder.

Q And it stayed in the same place it was?

A Yes.

Q And it stayed in the same condition that it was, nobody did anything to it; right?

A No, no.

Q Is that correct?

A Yes.

Q What about the next day, did --

MR. LYSAGHT: Your Honor, in all fairness, I think I will have to object to that last question. Is he talking about between the time the incident occurred and the time Mr. Whelan left the scow did the girder remain in the same position?

THE COURT: All right. Do you want to clarify the question to that extent?

Q Did you tell us, Mr. Whelan, that all work stopped on the scow, or everybody got off the scow?

A No, I don't know about the dock builders or anything, I don't know, but when that let go we didn't do no more hoisting. That's what I mean.

Q Was everything left the same way as far as you know?

A No. That I don't know what was done.

Q Did you come back the next day? Did you come back to the job the next day?

A No, no. No, we couldn't work any more. We couldn't work any more.

Q What time did this occurrence take place?

A Time of the day, you mean?

Q The time of the day, yes.

A I couldn't -- I don't remember what time in the day. I don't remember that.

Q Well, was it morning or afternoon?

A Well, I don't know if it was before noon or after noon. I don't remember that.

Q Do you recall what time you left the scow that day?

MR. FISH: The scow or the derrick?

Q The scow, or, the Century?

A Well, they took the scow away. They took the scow away from us, and tied him up to the pier. I guess tied him up, or something. As far as I remember.

Q And you don't know what happened thereafter; is that right? You don't know what happened thereafter to the girders and to the scow; is that right?

A No, I don't know. I don't remember what happened to the . . .

Q Did you ever give a signed statement about what you know about this accident to anyone?

A Well, there was on the log, the captain wrote a log, so that's on the log.

Q Besides the log, did you ever give a signed statement, or sign a statement as to the facts that you recall about this occurrence?

A I made a statement, you mean? No, I didn't made no statement to anybody.

MR. GEEN: I have no further questions.

THE COURT: Is there any redirect examination?

MR. FISH: No, your Honor.

THE COURT: All right. Thank you, you may come down.

(Witness excused.)

THE COURT: Next witness.

MR. FISH: Mr. Freelund, please.

AVRUM FREELUND, called as a witness in behalf of the plaintiff, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. FISH:

Q Where do you live, Mr. Freelund?

A 2 Gabbers Drive, Glen Cove, Long Island.

Q How old are you?

A Forty.

Q By whom are you employed at the present time?

A Hoffman International Incorporated.

Q You have heard the testimony and the statements of counsel in court this morning.

A Yes, sir.

Q They relate to a casualty in connection with the Century in April of 1970. At that time what was your employment?

A I was employed by Raymond International.

Q Speak up, if you can.

A I was employed by Raymond International then.

Q In what capacity?

A I was the assistant general manager of the Derrick Division.

Q As assistant general manager, what duties did you have with respect to the Century?

A I supervised, among other things, the repair and maintenance of the vessel.

Q Were you acquainted with Mr. Whelan?

A Yes.

Q How long have you known Mr. Whelan?

A Since I started work with the derrick fleet in February, 1959.

Q How much contact have you had with him?

A I would say considerable. I have been aboard the derricks on a number of jobs where he was the mate where we were both aboard continuously over the years. I would say in that time that I formed a pretty good opinion and knowledge of his character and capability.

Q What is your opinion as to his ability as a seaman and as a mate of the derrick?

MR. GEEN: That is objected to.

THE COURT: Pardon me?

MR. GEEN: That is objected to.

THE COURT: What is the ground of the objection?

MR. GEEN: The objection is that it has no probative value at all. It is completely irrelevant to the witness' opinion or as to the capabilities of Mr. Whelan.

THE COURT: Well, I gather that does call for a conclusion. You can ask him how long he had known him and so forth.

MR. GEEN: Excuse me, your Honor, but my objection is broader. It includes that basis, but it is broader than that. I don't understand the relevancy. The fact that somebody normally does a good job has no bearing on some particular incident. Somebody's habit or custom --

THE COURT: Well, I thought he was trying to bring out his experience, that he had been an experienced mate or something. Is that your objective?

MR. FISH: Yes, your Honor.

THE COURT: All right.

THE GEEN: The witness testified to his years of experience.

THE COURT: Well, that is why I was limiting the questioning to this man's knowledge of how long he had been employed, and that kind of thing.

BY MR. FISH:

Q What has been your experience with Mr. Whelan as a mate of a derrick?

A In the time of my association with the derricks he was considered by me and everybody else --

THE COURT: No.

Q Just you.

THE COURT: The question is --

A He was considered by myself to be the best mate that we had available to us.

MR. GEEN: This is non-jury, your Honor, but I still think that I ought to note my objection to it.

THE COURT: Yes. Sustained.

Q What technical experience, or training have you had?

A I graduated from MIT in 1955 with a Bachelor's

Degree in Naval Architecture and Marine Engineering. Then after leaving MIT I entered the Navy, and after OCS, I attended the Navy Ships' Salvage School.

Q And OCS is Officers Candidate School?

A Yes, sir.

Q As a result of that did you receive any commission in the Naval Reserve?

A Yes, sir, I did.

Q Were you on active duty in the Naval Reserve on any occasion?

A Yes. I served three years, a little over three years on active duty, leaving the Navy in January, 1959.

Q Were you at sea?

A Yes, sir, I was.

Q In what capacity?

A I was aboard an AT, that's a seagoing tugboat of the Navy. After I was aboard for six months I became executive officer of the ship.

Q Was she a salvage tug?

A Yes.

Q Did she do salvage work during that period?

A Occasional salvage work, yes.

Q Do you know when the Century was built?

A Construction was started in 1964 and completed in '65. She entered service in December 1965.

Q What did you have to do with the, either the design or the construction of that craft?

A Well, at that time I was employed by Merritt Chapman & Scott who built the vessel. I prepared the original feasibility studies for the derrick, a tentative design. I administered the design contract which was executed by New York Shipbuilding Corporation, and then administered the construction contract. The construction was by American Bridge Division of U. S. Steel.

Q When you say administered, does that mean you were in attendance at the work?

A Yes, sir.

Q There has been reference here to both Merritt, Chapman and to Raymond International. What is the connection between those two companies?

A Raymond International bought Merritt, Chapman & Scott's operation in December of 1965.

Q And you came along with it?

A Yes, sir, I did.

Q Will you tell us the further history of this derrick operation?

A It was operated by Raymond from 1965 through 19 --

August 1972 when the three large vessels, the Century, the Monarch and the Constitution were sold to The Port of New York Authority, who then chartered them on a twenty-year bareboat charter to Hoffman International who took over the business operation of Raymond in the derrick operation.

Q And you went along again with the fleet?

A Yes, I did.

Q So you are now employed by Hoffman?

A Yes, sir.

Q Were you familiar with the preliminaries to this erection, this bridge erection work in Jamaica Bay?

A Yes.

Q What connection did you have there?

A When the first inquiries were received I participated in, I don't know if we could quite call it feasibility, but a discussion of how the job could best be performed by Century, and what the Century's capabilities would be relative to handling those girders.

Q You have heard reference this morning to this lifting beam, steel beam?

A Yes, sir.

Q Who provided that for this work?

A It was provided by our customer, which was

Kiewit - Slattery.

Q Were you familiar with the design of that lifting beam?

A Yes. Well, there were two beams involved. We are talking about the one that was used on this girder that broke. The beam was designed by the consulting engineering part of Raymond International. I was not -- I didn't have any responsibility for the design, but there was contact and exchange of information between myself and the engineer who was working on the design.

Q Are you familiar with the actual operation of this beam at the work site in Jamaica Bay?

A Well, I observed it on a number of occasions.

Q There has been reference this morning to the fact that on each end of the lifting beam there were two arms coming down with an inverted "U" clamp at the bottom of each.

Now, can you tell us whether there was any equalizing device in connection with those two arms at one end?

A To the best of my knowledge, there was, and I base this on the fact that having observed these things being connected when one of the inverted "U's" would be connected, the other one would tend to float up and down, so as you got a slight motion of the derrick in the water which could only happen with the equalizer, and I remember in the design phase my feeling that an equalizer would have to be provided.

Q It is your conclusion that one was actually there?

A Yes.

Q Did you see the casualty?

A I didn't see it occur. I arrived later that day.

Q When did you hear about it?

A I'm not certain of the time of day, but I have the impression that it was early afternoon.

Q What did you do?

A I left, or, gave word to be passed to the derrick that they weren't to operate any further, and let the steam drop on the boiler. I notified the Coast Guard. I'm not certain whether it was before leaving for the site or after arriving there. And I got out there as soon as I could.

Q What connection has the Coast Guard with a job of this sort?

A Well, not so much with the job as with the vessel. The Century is an inspected vessel, and we were obligated to notify the Coast Guard of any casualty to her and since the word that I had was that the boiler was somehow involved, there was particular attention paid to the inspection of boilers and I let them know about it immediately.

Q You went out to the job site?

A Yes, sir.

Q What did you do there?

A I got aboard the Century as soon as I could. I observed the damage, and I believe the Coast Guard inspector arrived that afternoon. The boiler was leaking steam around some pipe connections, and after looking it over, I can say that we lost any fear of an immediate serious casualty to the boiler, but realized that some sort of repair would have to be made before steam could be raised again.

Q What did you do about recording the items of damage found? And further inspections by any other parties?

A Well, at that time, shortly after, I think it must have been the following day that we had a repair gang out from Bethlehem Steel with an estimator, and at that time we authorized the temporary repairs which is basically the replacing of some cracked and broken piping. And we had called in an independent surveyor to act for us in this, which was Holm Andersen's organization. Mr. Wolfe arrived acting for him.

I am not absolutely certain as to the dates, relative to the date of the casualty that a final and complete survey was conducted. It was obvious at the time, I seem to remember it being conducted at the job site rather than any place else, that we did examine the whole derrick, all of the areas of the derrick that appeared to have been affected, and wrote up a list of repairs that we agreed would have to be carried out to restore her to her condition before the casualty.

Q Can you tell us who was in attendance at those surveys, or, that survey?

A Well, I was, Mr. Wolfe was, there was an estimator from Bethlehem Steel, I believe it was Mr. Baum --

Q Who was he?

A He was the Bethlehem Steel estimator. I am not -- there were other gentlemen, but I am not certain of their names now.

Q There were other representatives there?

A Yes.

Q Was a record made of the damages found?

A Yes, we wrote out a survey report.

Q Was a record made of the repairs that all present considered necessary?

A Recommendations made, yes, as to the repairs.

Q Was that submitted to the shipyard?

A Well, the shipyard was a party to this, and, you know, they concurred in the --

Q Did you obtain a bid from the shipyard for the repairs that were recommended by the survey?

A Well, they, as part of the survey, all the parties agreed with the shipyard estimators to what a fair price would be for that repair.

Q Was a report drawn up at the time this was signed by the different representatives in attendance?

A Yes, sir.

Q Did you sign that?

A Yes, I did.

MR. FISH: May I have the exhibit, I believe it is Exhibit 5 marked for identification?

Q I have here what purports to be a survey report of A. Holm Andersen and signed by Mr. Wolfe, and attached to that is another document attached as part of the report, and I ask you what that other document is. [Handing.]

A That's the survey report that was prepared at the time detailing the damage found and the recommendations of repairs.

Q That is your signature there, too?

A Yes.

Q Is there any substantial difference between Mr. Wolfe's final report and that preliminary report?

A No.

Q Does that report set forth accurately the items of damage that you found?

A Yes, it does.

Q Does it set forth accurately the repairs that you considered necessary?

A Yes, it does.

Q Does that set forth the prices that were agreed by all, and particularly by the shipyard?

A Yes.

Q In your opinion were those prices fair and reasonable?

A Yes, they were.

MR. FISH: I offer this in evidence, your Honor.

THE COURT: Is there any objection?

MR. LYSAGHT: No objection.

THE COURT: All right, let it be received.

[Plaintiff's Exhibit 5 received in evidence.]

BY MR. FISH:

Q We have one more exhibit that remains in identification status, Exhibit No. 6 marked for identification. It consists of two invoices, I should say.

Can you tell us what those papers are, or can you identify them? [Handing.]

A Yes; those are the invoices received from the shipyard for the repairs.

Q Do they show the amount that was paid to the shipyard?

A Yes, they do.

Q Was in fact that amount paid?

A Well, the rubber stamp notations indicate that they were passed through to Raymond's Accounting Department to be paid, and I have no reason to doubt that they were paid.

MR. FISH: Thank you.

I offer those invoices.

MR. LYSAGHT: Forgive us, your Honor. May I ask counsel a question?

THE COURT: Yes.

MR. LYSAGHT: Although I have been doing so without asking permission.

THE COURT: All right. Is there any objection to that exhibit?

MR. GEEN: No objection, your Honor.

THE COURT: Let it be received.

[Plaintiff's Exhibit 6 received in evidence.]

BY MR. FISH:

Q Those documents, Exhibits 5 and 6, show the repair dates and that sort of thing. Are the exhibits accurate in that respect?

A Yes.

Q I notice that there were both temporary and permanent repairs. Will you tell us why two sets of repairs were necessary?

A Well, when we arrived at the site we found that some of the piping to the water columns on the boiler that indicate the level of water inside the boiler were cracked at the shell and steam was escaping there.

We found no other damage that might affect the integrity of the boiler as a pressure vessel, so in order to be able to complete the lifts while the derrick was at the site, the Coast Guard inspector agreed that we would be able to replace the damaged piping and make temporary patches to prevent the leakage of the smoke into the derrick.

Q I think you are going a little bit beyond at least the intent of my question.

A I'm sorry.

Q Were the temporary repairs performed so that the craft might complete her immediate assignment at the bridge?

A Yes.

Q And then she was taken away for permanent repairs?

A Yes.

MR. FISH: That is all I have, your Honor.

THE COURT: All right.

MR. LYSAGHT: With your Honor's permission, just a few questions.

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. LYSAGHT:

Q Mr. Freelund, I understand that you had been out to this site some time, or on other occasions prior to this casualty?

A Numerous times, yes.

Q Had you ever seen the lifting operations?

A Yes.

Q Had you ever seen the lifting operations as described by Mr. Whelan, the gentleman who testified here before?

A Yes.

Q On about how many occasions had you seen the lifting operations performed in that manner?

A I imagine I have seen eight to ten of the beams being installed.

MR. LYSAGHT: I have no further questions,your Honor.

CROSS-EXAMINATION

BY MR. GEEN:

Q Sir, the damages which are contained in that survey, were they all incurred as a result of this incident on April 28th, 1970?

A Yes.

Q Was the Century in an accident on April 10, 1970?

A Yes, indeed.

Q Excuse me?

A Yes, indeed.

Q Did the Century hit a bridge?

A Yes.

THE COURT: When was this with relation to the accident?

MR. GEEN: April 10th.

THE COURT: What was the date of this incident?

MR. GEEN: April 28th.

Q Now, on April 10th, 1970, when the Century was involved in this incident, or, hit a bridge, did it sustain damage?

A I'm not certain as to the dates. When the Century hit the Cross Bay Parkway Bridge, yes, she sustained considerable damage.

Q And at that time, which was only eighteen days before this incident, is that right?

A Yes.

Q At that time was the Century in the process of working on this bridge job?

A No, she was leaving the bridge job to run to the harbor to do another job. She was en route from the job.

Q I see.

THE COURT: Where was this bridge located again?

THE WITNESS: The bridge that she struck was the Cross Way Parkway Bridge.

THE COURT: No, the bridge on which the work was being performed that is in controversy here.

THE WITNESS: Oh, I beg your pardon. The bridge she struck was the Marine Parkway Bridge, which is west of the Cross Bay Bridge, which is the one she was working on.

THE COURT: Where was the bridge located that is in controversy here?

MR. FISH: Are you asking me, your Honor?

MR. LYSAGHT: Cross Bay, your Honor.

THE COURT: Where is that located?

MR. LYSAGHT: In Jamaica. Off Rockaway, I would say.

MR. FISH: The bridge under construction was further upstream in the inlet, so to get back to base from the construction job, she had to come down and go through the other bridge, and she was under tow of a tug and they low-bridged her.

THE COURT: All right.

BY MR. GEEN:

Q Well, whatever the reason was she sustained a substantial amount of damage at that time; is that right?

A Yes.

Q And thereafter between April 10th and April 28th did the Century continue to work on this bridge job?

A Again, I will have to say that I'm not certain of the dates, but after striking the Marine Parkway Bridge she was unable to work until repairs were carried out. Repairs were carried out immediately after that before she entered service again. There was damage to rigging components and in order to make- these repairs satisfactorily it was necessary to perform an overload test on the derrick after repairs were made.

Q So that it would --

MR. FISH: Excuse me. I might state at this time, your Honor, that if counsel wishes to get the exact dates of employment of this craft, I have got a set of the dispatcher's sheets here and I think they could be, those dates, could be developed in short order through Mr. Freelund. If counsel wishes that.

I might say that as a result of my examination of those dispatcher's sheets that I have made no claim in this case for loss of use of this vessel. These are repair costs only that plaintiff claims.

Q The Century then was out of operation for some period of time after April 10th?

A After striking the Marine Parkway Bridge, yes.

Q Yes. And was all the damage that had been caused in the accident of April 10th repaired?

A Absolutely.

Q Prior to its being returned to service?

A Absolutely.

Q Do you have any records of the repairs made to the Century after the April 10th accident?

A I don't have it with me. I believe I saw them attached to some of the papers that were around in connection with this case. I didn't bring any along.

Q Did any of the damages overlap as far as areas of the vessel?

A No.

Q That is your best recollection at this time; is that right?

A Yes.

MR. GEEN: I have no further questions.

MR. LYSAGHT: With your Honor's permission, may I --

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. LYSAGHT:

Q Just so we get the geography straight, Mr. Freelund, the Marine Parkway Bridge, that is the bridge that connects the far, or southern edge of Brooklyn with what we used to call Riis Park; is that correct, sir?

A I don't remember that much about Riis Park. It's the -- we would have to go past, I guess, if you call it Floyd Bennett Field that --

Q Past Floyd Bennett Field, then you arrive at the Marine Parkway Bridge?

A Yes.

Q Then you either go over to Riis Park or Breezy Point?

A Yes.

Q Now, in the body of water if you are sailing under the Marine Parkway Bridge, in order to get to the bridge that was involved in this particular accident, the Cross Bay Bridge, you proceed east; is that correct, sir?

A Yes.

Q And when you were about even with the Cross Bay Boulevard which extends from, I guess, from Southern Queens over to Rockaway, is that the Cross Bay Bridge?

A Yes, I believe it is the extension of Woodhaven Boulevard.

Q An extension of Woodhaven Boulevard, yes, going south; is that correct, sir?

A Yes.

Q Then crossing over the water?

A Yes.

Q And that is the bridge that was involved in this casualty, is that correct, sir? That is the site where the casualty occurred?

A Not striking the bridge, you mean the lifting casualty?

Q Yes, right.

A Yes.

Q Sir, Mr. Fish questioned you about the lifting beam itself.

A Yes, sir.

Q That would be the beam that came down and was attached to these particular girders and then raised. Did you say, sir, that you were in attendance at a meeting of consulting engineers for Raymond International?

A No, I didn't. I said that Raymond acted as consulting engineers in addition to the derrick operations. The derrick operations were a small part of Raymond's overall operation, and Raymond does, and I believe still does, consulting engineering work.

Q Did they act as consulting engineers in connection with this lifting beam?

A Yes.

Q Did they also act as consulting engineers in connection with the girders?

A Not to my knowledge, no.

MR. LYSAGHT: Thank you, your Honor.

THE COURT: Did you testify that the beam itself was furnished by --

THE WITNESS: By Kiewit.

THE COURT: [continuing] By Kiewit?

THE WITNESS: Yes.

THE COURT: What do you mean by that?

THE WITNESS: They bought it, had it built, and it was designed by Raymond International as consulting engineers.

THE COURT: Read that answer, please.

[Answer read.]

THE COURT: The beam was designed by Raymond International?

THE WITNESS: Yes.

THE COURT: And Kiewit did what?

THE WITNESS: Well, Raymond International furnished them with a set of plans to have the beam built, and then Kiewit contracted with somebody or other to have them built to the plans.

THE COURT: I see. All right.

MR. LYSAGHT: If I may, your Honor.

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. LYSAGHT:

Q That was what I was just a little confused about. In other words, Raymond International was employed by Kiewit to design this lifting beam; is that correct, sir?

A To my knowledge, yes, sir.

Q And Raymond International consulting engineers designed the entire beam; is that correct?

A The lifting beam.

Q The lifting beam.

A Yes.

Q And then as a result of that design, Kiewit consulted with someone else to build the lifting beam in accordance with the design made by Raymond International?

A That's my understanding. I wasn't party to those contracts or discussions.

Q And that included the hooks that went down onto the beam as well?

A Yes.

MR. LYSAGHT: Thank you.

THE COURT: All right, thank you. You may come down.

[Witness excused.]

MR. FISH: That is plaintiff's case, your Honor.

THE COURT: Are there any motions at this time?

MR. LYSAGHT: Yes, your Honor. On behalf of my client, the defendant, Kiewit - Slattery, I respectfully move to dismiss the plaintiff's complaint on the ground that there has been no showing of any negligence of any breach of any duty owing by my client, Kiewit - Slattery, to the plaintiff.

From all the evidence before your Honor at this point, it would appear that this casualty occurred by reason of the parting of this lifting device. There is no proof that my client had any notice, my client did not build this particular beam.

THE COURT: When you say lifting device, are you referring to these hooks that were built into the concrete beams?

MR. LYSAGHT: Yes, your Honor. There was no evidence that my client knew or should have known that there was a defect in this particular lifting device built into the concrete girders.

They purchased it from Bayshore, and it was shipped up and put in place in accordance with the evidence, and there is no evidence that my clients did anything wrong which resulted in the casualty in question.

THE COURT: All right. Mr. Fish, do you want to --

MR. FISH: If your Honor please, negligence of the principal defendant is not an element of the plaintiff's case. We rely upon the warranties in the contract of employment between Kiewit and Raymond.

We also rely on the doctrine of implied warranty of workmanlike performance which I believe would be quite familiar to your Honor, and the Supreme Court has extended that to constitute a guarantee of safety and effectiveness of apparatus which is furnished by the servant in the performance of his work.

So we say that Kiewit furnished this lifting device and that it warranted the safety thereof. The device failed under normal usage. There is a breach of warranty there, and we also submit that under the general as it is now interpreted as to manufacturer's strict liability for dangerous instrumentalities, that that would also apply to Kiewit's relationship to Raymond.

Now, it is not necessary to show that it was an actual fact. I mean, evidence is seldom available. As to that we say that the circumstances speak for themselves.

THE COURT: Well, what was the contract between Raymond and Kiewit?

MR. FISH: That is set forth at some length in my requests, the pertinent --

THE COURT: Well, give me the essence of it now. What was Kiewit to do?

MR. FISH: Kiewit was to supervise and superintend this work. It was to furnish the equipment necessary apart from the derrick itself and its falls. The lifting devices, that beam and anything else that was necessary, was to be furnished by Kiewit, and Kiewit guaranteed.

shall we say, covenanted, to indemnify Raymond from any loss resulting from failure in those respects. That is plaintiff's position, your Honor.

THE COURT: Well then, it is your position that the defendant Kiewit breached its duty of workmanlike performance as set forth, or implied in the contract?

MR. FISH: Yes, your Honor, that and the breach of the actual covenant of the written document. Both elements here.

THE COURT: All right, what covenant? Do you want to read that?

MR. FISH: Do you have a copy of the findings of --

THE COURT: Yes, I have the findings.

MR. FISH: It appears on Pages 3 and 4. The specific paragraph is 8, it covers the furnishing of the equipment, and Section 9, which is on Page 4 is the indemnity agreement. Section 11 shows exercise of direction and supervision. It contains further indemnity.

THE COURT: What do you say, Mr. Lysaght, about these provisions which seem to indicate that you were responsible for the lifting devices? Including fittings.

MR. LYSAGHT: Is your Honor directing my attention to Paragraph 9th of the agreement?

THE COURT: First eight.

MR. LYSAGHT: Eight. Well, it says that -- I'm sorry.

THE COURT: Yes, it says that you are to provide, or furnish any and all special fittings, lifting devices, strongbacks and slings required for hooking onto and hoisting within direct reach of the derrick's tackle, the various girders together with all labor for slinging, guiding into place, securing the members as hoisted in place, in casting off of slings and lifting devices without cost to Raymond.

MR. LYSAGHT: Well, it is my position, your Honor, that I don't feel that that provision has anything to do with what we are dealing with here. It refers to fittings, lifting devices, strongbacks and slings required for hooking onto and hoisting within direct reach of the derrick's tackle the various girders together with all labor for slinging, guiding into place, securing of members as hoisted in place and casting off of slings and lifting devices without cost to Raymond. I don't think that that constitutes any indemnification provision.

In other words, it is merely an agreement to provide those particular items.

THE COURT: Well, that is the next, 9.

MR. LYSAGHT: Now, that's what I was concentrating on, your Honor. and I respectfully submit, that that constitutes an indemnification agreement by Kiewit to save Raymond International harmless from claims to third persons. There is no provision here that Kiewit International will insure or make good for any property damage by Raymond International itself.

In other words, that particular clause, if your Honor will notice, they agree to indemnify, defend and save harmless its vessels, agents, et cetera, from any loss, liability, damage or expense, including attorneys' fees and Court costs arising from, suffered or incurred in connection with any claim for injury to persons or property resulting in whole or in part of the failure or insufficiency of the facilities and/or equipment. Furnished or installed by Kiewit - Slattery.

I respectfully submit, your Honor, that that particular agreement is an agreement to indemnify against claims from third parties, and I think it could only be construed in that manner, your Honor.

THE COURT: Well, let me ask you about these hooks that were built into the steel girders by the manufacturer. Were they put there at your specification?

MR. LYSAGHT: This I couldn't answer at the present time, your Honor. They were ordered from that particular contractor, Bayshore.

THE COURT: The hooks were ordered placed in the beams by your company?

MR. LYSAGHT: Well, the girders were ordered from them, your Honor. As far as who put them in there, I couldn't tell you. I know that Bayshore put them in.

THE COURT: Well, the question is, were they put in at your direction to operate in connection with the steel beams?

MR. LYSAGHT: No, ma'am, I think they were already in there. I think that Bayshore had them in there for their own devices as well, because they had to move these beams around their own yard.

THE COURT: So they are generally a part of the beam itself so it could be lifted.

MR. LYSAGHT: I hesitate to give you an unqualified answer to that, ma'am, but it is my understanding that that is the case.

THE COURT: And it is your claim that what happened here was that one of these hooks put in by Bayshore failed; is that it?

MR. LYSAGHT: Yes, ma'am.

THE COURT: Well, I believe that Mr. Whelan testified, and also Mr. Freelund,that all four of these hooks came apart. I realize Mr. Whelan's testimony appeared to be that only two of these hooks were engaged in this process.

Now, which is it? Is it just a conflict in the testimony?

MR. LYSAGHT: No, I think all four were involved in the lifting process. In other words, each girder had two lifting straps, or loops, on each side.

THE COURT: Is that the way you other gentlemen understand the testimony? Because I thought that he was saying only one end was engaged.

MR. FISH: No, your Honor.

THE COURT: All four were engaged.

MR. FISH: Two loops on each end, and it is my understanding that the loops at one end gave way, then the other loops gave way, and then the lifted beam just took off.

THE COURT: In other words, all four hooks were engaged.

MR. FISH: All four hooks were engaged, and all four eventually parted. Probably in terms of fractions of a second.

THE COURT: Now, was your company responsible for furnishing the iron workers and other workers who were to remove this block of wood, unscrew it from the "V" shaped support? Did you furnish that help?

MR. LYSAGHT: Yes, ma'am. Yes. In other words, the complement of the scow where the beams were located consisted apparently of Mr. Whelan, who is an employee of Raymond International, who just testified, Mr. Jess Comer, whom I have in court, he was employed by my client to also supervise the work and iron workers which we retained. And it is our contention, I don't think it is the plaintiff's contention, ma'am, that there was any negligence in the manner in which the beam was lifted, it is our contention that there was a defect in the lifting strap.

THE COURT: Well, I gather it is the plaintiff's contention that it was your failure to provide the careful work with respect to whatever had to be done to lift these girders; is that the plaintiff's claim?

MR. FISH: Yes, your Honor. I do not contend at this time that Kiewit was negligent in its inspection and use of these loops, although it is possible that third party defendant's testimony may bring out something in that respect. But I am considering it just at present as between myself and Mr. Lysaght.

I do not say that they were negligent in their inspection. I say that this resulted from some inherent defect which was not discoverable. I think the defect must have been there or it wouldn't have broken.

But I'd say that I don't contend that that was discoverable by reasonable inspection by Kiewit. If, however, the third party's testimony is that this was caused by failure to free the beam and then combined with instructions to our captain by Mr. Comer to go ahead and lift a fast beam and put an unnecessary strain on there, then there is negligence.

But I am not resting my case on that at this point. I think that beam was perfectly free. I think Mr. Whelan, I believe his testimony was accurate. There was a language barrier there probably, and his understanding of questions and his answers may have been to some extent at cross purposes, but I think the message comes through loud and clear that that beam was free and was lifted in proper manner.

If that is so, I find no negligence on the part of Kiewit.

MR. LYSAGHT: I think, your Honor, that Mr. Fish is going on the basis of the contract marked for identification which I construe --

THE COURT: Well, the testimony of Mr. Whelan leaves certainly a question as to whether those beams were in fact free. His testimony seemed to be at first that he didn't see a wooden block, he didn't recall a wooden block. Then when he was finally shown pictures of how those girders were secured, he then admitted seeing the wooden block, that that is the way they were held together. It would seem to indicate he is not certain in his own mind that the girders were entirely free.

That is why I am asking Mr. Lysaght whether his client, Kiewit, was responsible for furnishing the workmen whose duty it was to unscrew those blocks and free the girder itself. And asking whether it is your claim that they failed to properly unscrew them and, therefore, breached their duty of workmanlike performance.

MR. FISH: I would like to be heard first on Mr. Whelan's testimony, your Honor. Now, the question is blocks. There is a difference between a block and blocking, and shoring timber. Usually items of cargo have braces, long wooden braces, and they have got dunnage under them, and I think that was the type of material that Mr. Whelan understood. Because he said, whatever was there, every time he was asked this question, he says, I don't recall blocks, but whatever was there they took away. Every time he said that. He said they took something out of there.

He was consistent in that point of view.

THE COURT: Well, the record seems clear that those hooks were broken. The question is how they became broken. Whether because they were inherently defective, or the wire was rusty, which was used in making them, or whether the workmen failed to unloose these blocks and chains which held the girder so that when the derrick went to lift it, they were bolted, in effect, to the stanchions, or whatever you call them, which hold them, and that is what caused these hooks to break, because the bolts had not been unloosened.

Now, there is evidence from which the Court could find that they had not been because of Mr. Whelan's testimony which were not clear.

MR. FISH: I submit, your Honor, that there was no evidence whatsoever that at the present stage that the beam was secure. Mr. Whelan said that they loosened up those clamps. That freed the beam. Now, there is no testimony to the contrary. There is not a word in this case from Mr. Whelan or anybody else that those -- that that beam was in fact gripped. He denies vehemently that it was gripped. I don't see how your Honor can say that his testimony supports the exact contrary.

THE COURT: Now, I am saying his testimony was not clear, it was equivocal. That is, he first said he didn't remember any such blocks, he didn't remember any such chains, and then he finally admitted that he remembered it. That is a crucial consideration here, as to whether those blocks and chains were unfastened so that the derrick could lift those girders.

Now, obviously if they were still fastened and the derrick attempted to raise the girder, that would cause those hooks to break. It seems to me that that is self-evident that they would break, because those girders were still fastened.

So, that is crucial, as I see it, and his testimony was equivocal at best as to that.

Now, all I'm asking you, Mr. Fish, therefore, is, is it your claim that it was the defendant Kiewit's responsibility to unloose those?

MR. FISH: Yes, your Honor.

THE COURT: And in that sense breached its duty of workmanlike performance.

MR. FISH: Yes, your Honor.

THE COURT: He admits he furnished the workmen to do that.

MR. FISH: Yes, your Honor. If your Honor should find, and I don't see how you possibly could on the testimony today, that those were not unloosened, then I say that is a clear breach of their obligation in supervising and executing this phase of the loading operation. That I will answer affirmatively to. That is a breach.

If your Honor so finds that those clamps were not unloosened.

THE COURT: Now, let me ask you this: Is it your contention that Kiewit was to furnish the hooks which were placed as Mr. Lysaght says in the concrete beams themselves when they were manufactured, is that a part of what he was to furnish?

MR. FISH: Absolutely. That contract of manufacture between -- well, our contractor, Kiewit, says that Kiewit is to furnish all the devices necessary for lifting. That was a necessary device.

THE COURT: That is what I am getting at. It is your claim that that is a necessary device.

MR. FISH: Absolutely.

THE COURT: It could not have been lifted without that hook?

MR. FISH: Not as the beam was constructed.

When we didn't use those hooks any more, the beam itself had to be modified and a different arrangement made. They punched holes so that we essentially could put heavier slings around that beam.

THE COURT: Wait a minute. Say that again. They did what?

MR. FISH: They punched holes in the tops of every beam that was placed over this, and the photographs will show that, holes so you could pass a very heavy wire sling down around the beam and back up again in a loop and hook it to that. Much, far stronger than these loops that were cast into the beam itself.

THE COURT: All right. But the question is whether those loops were an essential part of the equipment that Kiewit was to furnish. You say that is your claim.

MR. FISH: Yes, your Honor.

THE COURT: And that is included in that contract provision that I referred to, Paragraph 8.

MR. FISH: Yes, your Honor, that is a lifting device.

THE COURT: All right. And Mr. Lysaght, I gather you agree that is a lifting device?

MR. LYSAGHT: Oh, yes, your Honor. May I be heard, your Honor?

THE COURT: All right.

MR. LYSAGHT: I am sorry, am I being presumptious?

THE COURT: Well, your motion would have to be denied, it seems to me, if you are providing that lifting device. It did break.

MR. LYSAGHT: Well, I think really the plaintiff's claim narrows down to this: That there was no negligence in the manner in which this thing was lifted. That one of these lifting devices broke, and that pursuant to that contract, that provision of indemnification of the contract, my client is bound to his client.

I would, my motion is I do not construe that as an absolute indemnification agreement to reimburse them for any loss that they sustained.

MR. FISH: I think there is a clear answer to that one, that even if you do so construe it, there is a breach of contract to furnish a proper lifting device, and this is damage which flows foreseeably and naturally from that breach of contract regardless of whether it is a formal written contract or not. I would say it's Horn Book contract law.

MR. LYSAGHT: I would agree with Mr. Fish with all due respect, your Honor, I think there is no negligence in failing to remove the blocks. I think there was a slight language barrier in that when Mr. Whelan was asked referable to a block by words in a question, he didn't know what he was talking about. But then when he was shown a photograph, he identified it, but was vehement in his insistence that all these blocks were removed.

THE COURT: Well, it seems to me your motion would have to be denied.

MR. LYSAGHT: I respectfully accept.

THE COURT: All right. Do you have some motions at this time, Mr. Geen?

MR. GEEN: Yes, your Honor. Of course not addressed to the claim of Kiewit, the third party claim of Kiewit against Bayshore. That, I would be premature if I addressed that.

But there was a claim directly by Raymond International.

THE COURT: Against you?

MR. GEEN: Yes, your Honor, and I do want to address that. But, before I do, if I may, a great deal of comment has been made about the evidence and what the witness said and did not say, what he meant to say and language barriers. I think I would be presumptious if I had to ask your Honor for the opportunity to argue the opposite. I am not going to comment about it.

I think your Honor realizes that to a certain extent, to a large extent, Mr. Fish and Mr. Lysaght are united in interest to attempt to pass this loss all the way down the line to Bayshore here and, therefore, I don't think it is necessary to say, to comment on the witness' testimony.

There is no contract between Bayshore and Raymond upon which Raymond can rely on any contractual cause of action. I respectfully submit that there has been no proof of any negligence. There has been no proof of any defect.

Mr. Fish seems to say that since four loops broke, that means he would have a prima facie case of defective beam, defective loops. I don't understand that at all. Here we have the testimony that 200 of these beams were lifted before, and now we have a beam being lifted and all four loops break, and Mr. Fish would have you say that there was no reasonable inference, or the most probable one is that those loops were defective.

I submit that that is not the fair inference, that it is equally probable that it was caused by the manner and method that it was handled from the time that it left Virginia where title transferred to Kiewit, until the time of the occurrence, and that includes all the handling of it.

I don't see any prima facie case made out by Raymond against Bayshore and, therefore, I move for judgment dismissing the cause of action against Raymond International against Bayshore.

THE COURT: All right, Mr.Fish.

MR. FISH: Again, negligence is not an element of the case. This is a strict products liability. I have in my request for rulings of law stated the principles and the principal authorities, and just several days ago attention was called to a very recent case, I think it is a slip opinion in The Court of Appeals here, in which they cited another very recent New York Court of Appeals case which establishes the law both of the Second Circuit and of New York itself, is precisely as outlined in the restatement of the law. And that I have quoted in my requests.

You have the document with my request there, if you will look at Page 8, there is a literal quotation of the rules stated in the restatement of the Bar of Second Torts, and it is borne out by the other authorities I have cited there immediately preceding, and by another case which I shall -- well, I can furnish it to you first thing in the morning when I look through my papers a little more carefully.

I thought I had it right here on top of the pile, but I don't see it. It is hard to cite it in connection with a discussion. The text books, as well as under the statement, make it very clear that where something fails in the ordinary course of usage, that is expected of it and there is no reasonable explanation for it, it must be presumed that it was defective. That is sufficient. If it had been mis-used, mishandled, something of that sort, that is a defense, yes. But there is no evidence of that.

As to the care and custody of this, the testimony and the evidence as I understand it, this was delivered by Bayshore, this beam, aboard this specially fitted barge, because you had to have all this steel construction on it, and that beam wasn't touched again, it was simply towed up and placed alongside the dredge. There is nothing to indicate it was ever touched or misplaced until it was ready and attempted to be lifted.

So there is no misuse of the beam on the inside other than possible exposure to the weather. Now, this beam had been in existence, it was built, I believe, the previous year, it had been out probably in the open down there, it is subject to marine perils of moisture, possibly boarding seas on the way up, and it looked like it is.

Now, it should have been protected against any such elements as that, and it wasn't. I mean in construction. That should have contemplated that sort of thing.

I say tha_ the only explanation of this is the defect in construction, and that that is sufficient to establish the case under this statement of the law against Bayshore.

THE COURT: May I see that exhibit which showed the broken hooks?

MR. FISH: That would be my Exhibit No. 4., I believe, your Honor. It broke beneath the surface of the cement. So, if there was a crimping of the wire, damage to the wire in construction, you see, it wouldn't have been obvious, but the defect would have been there just the same. It's a possibility.

MR. GEEN: Your Honor, excuse me. I don't want to interrupt, I don't want to be discourteous, but I have heard more testimony about what happened when this barge was on the way up from Virginia, what happened during construction, where this thing broke, and the only time I have heard all this testimony is from Mr. Fish. I didn't hear it in the case, and I don't mean to be sarcastic, but

I think this is improper. This is Mr. Fish' interpretation. This is argument not from any evidence in the record.

THE COURT: Well, we are focusing now on the evidence which is Plaintiff's Exhibit No. 4, two photographs, and each photograph shows these hooks in a broken condition.

Now, are these all four involved in this?

MR. FISH: Yes, your Honor. There are some notations on the back of them which indicate that two of them are on one end and two of them are on the other end.

THE COURT: I see. And there does appear to be some evidence of rusting on the photograph, the color photographs. The area around the wire does appear to have rusted.

Now, if the Court should find that all of these fastening devices had been removed from the concrete girder, as Mr. Whelan testified at some point in his testimony before the hoisting, the final hoisting operation took place, then it would be clear, wouldn't it, that what happened here is that the accident was caused by the failure of these hooks which your company put in there; isn't that so, Mr. Geen?

MR. GEEN: No. I have to answer that question in the negative because there are other factors involved.

I must say that I would hesitate to say this if I hadn't heard a great deal of argument given to the Court already, but it does strain credibility that all four would fail at the same time, or that even two would fail at the same time. I know I am anticipating testimony, your Honor, but there will be testimony in this case from an engineer that if one had failed, the other three should have adequately held, there was that much of a safety factor built in. Yet, the testimony is that they all failed.

Now, to assume therefore, that all four were defective, or two were defective, because I think I have to fairly say that if two failed together, it is likely the other two would have failed --

THE COURT: Well, if one failed --

MR. GEEN: Three would hold it.

THE COURT: [continuing] -- it seems to me that there would be a redistribution of stress involved somehow.

MR. GEEN: And three would hold it.

THE COURT: Which would put a different weight on the remaining three, which might cause them to break as a natural consequence of one having broken; isn't that so?

MR. GEEN: No, because the safety factor built in was 3.5 times the weight of the girder, and if one broke, it would be reduced in half, and you would have 1.7 would be the safety factor of the girder. So, it should have held. If a second one broke, the second one had to be defective. That I say strains reason.

Just as a matter of coincidence, that after lifting 200 of these girders you get one with two of these straps which for some unexplained reason, we don't know why, I don't think they are claiming rust now, there has been no proof of that, are defective.

THE COURT: Well, I thought they were claiming rust. Are you claiming rust from the picture?

MR. FISH: That's what Mr. Whelan testified to, and as your Honor observed, that is what the photographs show.

THE COURT: Yes, I recall Mr. Whelan testified it was rusty as you could see in the picture.

MR. GEEN: Yes, but there is no testimony in this case that rust would have any effect whatsoever on the bearing capacity, nor is there any testimony as to when this rust developed. And title to these girders passed down in Virginia when they were loaded, right in the contract between Kiewit and Bayshore. And this particular girder --

THE COURT: Well, does it give a date when title passed in relation to the date of manufacture?

MR. GEEN: Yes, I can give a date.

THE COURT: Is that in the evidence?

MR. GEEN: It is in the Interrogatories, your Honor. Shall I refer to it?

THE COURT: Yes .

MR. LYSAGHT: If I may be heard on that, your Honor --

THE COURT: Just a moment.

MR. LYSAGHT: I'm sorry.

THE COURT: One thing at a time.

MR. GEEN: April 13, 1970.

THE COURT: They were manufactured?

MR. GEEN: No, title transferred.

THE COURT: Well, that has no relevance unless you can give me the date of manufacture to our discussion. The question is how long they may have been around on the pier down in Virginia somewhere out in the weather uncovered, as Mr. Fish suggests. Is there any evidence as to --

MR. FISH: Yes, your Honor. Answer to Question 6 in the Interrogatories to third party defendant, it was manufactured in 1969 at Cape Charles, Virginia, that's the only testimony we have.

THE COURT: No month, just the year?

MR. FISH: It was in the previous year, that's all.

MR. GEEN: You are being asked to make so many inferences upon inferences.

THE COURT: No, we are not. We are looking at the evidence now. Those interrogatories are in evidence, aren't they?

MR. FISH: Yes, your Honor, that was the first thing I did.

THE COURT: We are looking at the evidence now, there is evidence on which the Court could find that these beams were manufactured a year before and title passed to the defendant Kiewit as a result of which rust caused the weakening of these, it looks like wires covered with something here, which created these loops and that that rust was the cause of the breaking here, so that your motion to dismiss the plaintiff's case would have to be denied, it seems to me. Admittedly it was built in there by you for the purpose of facilitating the lifting of these girders; isn't that so?

MR. GEEN: It was installed into the girders for the absolute necessity of Bayshore using them to lift the girders after manufacture and put them on the scale, and I would admit that they were left there for use as far as the convenience of Kiewit is concerned. But if I just may say this, your Honor, although I have not checked with my clients, I am absolutely sure that this after manufacture had been exposed. The girders. And therefore were subject to rust.

But I said before that I believe that the Court has to be asked to indulge in inference upon inference upon inference.

Now, if I just may take a moment to explain what I mean, you are being asked to say that rust was caused during the time it was in the possession of Bayshore, that that rust was in substantially the same --

THE COURT: The issue is whether the plaintiff has that burden. Does he have the burden of proving all that, or does he merely have to show that a device failed when used for the purpose for which intended? Does he have the burden of showing all that you suggest?

MR. GEEN: I think he has the burden since this is not res ipso, certainly.

THE COURT: Well, it seems the doctrine of strict liability seems to resemble that if it has any meaning at all, than if it was being used for its intended purpose and the purpose was, you admit, these were put on there to facilitate the lifting of these beams, and if that breaks while being used for its intended purpose according to Mr. Fish, the law is that you are strictly liable. He doesn't have to go and show all kinds of reasons how it could have broken. All he has to show is that it broke during its normal and expected use.

MR. GEEN: I respectfully submit that he may not have to show a particular defect. I would agree with that. He doesn't have to show a particular defect, but he must prove, and his burden of proof is to show a defect. That I say he has not done.

Also those cases say where there is strict liability that other reasonable explanations are excluded. I say Mr. Fish has not done that, he has not excluded other reasonable explanations. As the present status of the case it is more reasonable to believe that these four loops were not defective and that they were on the evidence in the case at this present time which is all I can address.

THE COURT: All right, that motion is denied.

Now, we are going to recess until tomorrow morning. We are going to recess until ten o'clock tomorrow morning.

(Time noted: 3:45 p.m.)

* * *

RAYMOND INTERNATIONAL

-against -

PETER KIEWIT SONS' CO. and

SLATTERY ASSOCIATES, INC.

70 Civ. 2712

- and -

PETER KIEWIT-SLATTERY

-against-

BAYSHORE CONCRETE PRODUCTS CO.

6 June 1974

10:15 a.m.

(In open court.)

THE COURT: Good morning, gentlemen.

MR. LYSAGHT: May I proceed, your Honor.

THE COURT: Yes, you may.

MR. LYSAGHT: Mr. Jess Comer.

JESS W. COMER, called as a witness in behalf of the defendant, being first duly sworn by the Clerk of the Court, testified as follows:

MR. LYSAGHT: With your Honor's permission.

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. LYSAGHT:

Q Mr. Comer, are you slightly hard of hearing ?

A Just a little bit, yes.

Q All right. If you don't hear a question or don't understand it, would you tell her Honor and ask us to repeat it?

A Yes. Okay.

Q Mr. Comer, how old are you, sir?

A 61.

Q What is your present occupation?

A Project superintendent.

Q By whom are you employed?

A Peter Kiewit Sons Company.

Q What are your duties at the present time?

A We are installing an outfall system for the Florida Electric Power & Light Company.

Q What are your duties in connection with this installation at the present time?

A Project superintendent.

Q For how long have you been employed by your present employer, Peter Kiewit?

A Seven years.

Q How long have you been in this industry ?

A Would you repeat that, please?

Q Yes. How long have you been in this industry?

A Forty years.

Q During the course of your forty years have you ever operated derricks?

A Yes, I have.

Q For how long a period of time did you operate derricks?

A Well, off and on I'd say about three years.

Q Did you operate derricks on the water?

A That's correct, yes.

Q In connection with the operation of derricks can you as an operator tell the load that you are lifting?

A I could tell the load by the lifting of the barge.

Q Would you explain that in simple terms to me?

A Well, when you are picking up a load and you are picking off of the side of the barge, it takes so many tons to displace so many ton.

Q Well, as I understand it, sir, before you make a lift your vessel is even with the water; is that correct?

A That's right.

Q And the side and the front and the rear of the vessel are a certain footage above the water; is that correct, sir?

A That's right.

Q If I could use an analogy, if I were in a row boat standing in the middle, perfectly in the middle, it would be even; is that correct?

A That's correct, yes.

Q And if I lean towards the side, the side that I was leaning toward would dip further closer to the water; is that correct?

A That's correct.

Q Can an operator of a derrick tell whether he is exceeding the load that he is designed to lift by the listing of the boat towards the water?

MR. GEEN: I object to the question.

THE COURT: Pardon me? There is no objection without a ground in this Court. What is the ground of the objection?

MR. GEEN: I'm sorry. The question asked for a conclusion from the witness without a proper foundation, without a proper hypothetical, without enough facts to base any opinion on.

THE COURT: Well, he is asking an opinion of an expert, and he has qualified him as such. Overruled.

Q Would you answer the question, Mr. Comer? Do you want it repeated?

A Please.

MR. LYSAGHT: With your Honor's permission, would the Court Reporter put the question?

THE COURT: All right.

(The question was read.)

Q Did you hear him?

A I didn't quite hear him, no, sir.

(The question was read.)

A Yes, he can.

Q How is that done?

A Well, first before you pick up a load you know how many ton this object weighs that you are picking up, and if it exceeds the rated capacity of the derrick, then you don't pick the load.

Q Well, how can you tell that by the operation of the derrick, or the operation of the vessel that you are on?

A Then she lists too much.

Q For example, if you --

THE COURT: I understood that. He said it would list too much.

THE WITNESS: Yes, ma'am. It tips.

THE COURT: Yes. All right.

Q Let me take you back to the time of this incident. You were not an operator at that time, were you?

A No, sir, I was not.

Q What were your duties at that time?

A I was general superintendent.

Q On April 28th, 1970, the date of this incident, were you and others working at the Cross Bay Bridge site out in Queens?

A Yes, I was.

Q Were you working in conjunction with the barge Century?

A Yes, I was.

Q Did that work consist of lifting beams off the scow and having the barge bring them up to the bridge to put them in place?

A That's correct.

Q Before this incident occurred, approximately how many beams had you lifted? I don't mean that morning, but during the entire operation.

A The entire operation there was approximately between two and three hundred beams.

Q Had there been any mishaps?

A Not to my knowledge, no.

Q Would you describe the manner in which these beams were raised? Would you tell us the position of the barge with reference to the bridge and the position of the scow with reference to the bridge and the barge?

A Derrick Century was lying east and west in reference to the bridge which was north and south.

Q Well, just if I may stop you there for just a moment, did the bridge extend generally north and south?

A Yes.

Q Do I understand you to say that when you say the derrick Century was laying east and west it was facing the east or west?

A It was facing east.

Q Facing east?

A Yes.

Q I see. In other words, the forward portion of the derrick would be facing east, and the rear portion of --

A Towards the bridge.

THE COURT: Let's not repeat the witness' testimony.

MR. LYSAGHT: I'm sorry.

Q Was the Century east or west of the bridge?

A Would you please repeat that?

Q Was the derrick Century situated east or west of the bridge?

A It was situated west of the bridge.

Q Approximately how far west?

A I'd say approximately four or five hundred feet.

Q Where was the scow with reference to the Century?

A At that time the scow was on the starboard side of the Century.

Q And by starboard side you mean it was south of the Century?

A That's right.

Q In which direction was the front direction of the scow facing?

A The front of the scow was facing east.

Q What distance separated the side of the scow from the side of the Century?

A I'd say approximately forty feet.

MR. GEEN: I'm sorry, I didn't hear that.

MR. LYSAGHT: Forty feet.

THE COURT: Forty.

Q Now, sir, were there beams situated on the scow?

A Yes, there were.

Q How were they positioned that morning before the incident occurred?

A Well, my recollection, there was five beams aboard this scow.

Q How were they placed aboard the scow?

A They were placed laying on timber. They were resting on timber.

Q Were they situated parallel with the sides of the scow, or how?

A They were -- these beams here were parallel with the scow.

Q Did these beams have lifting hooks embedded into them?

A Yes, they did.

Q Were there two on each side?

A There were two at each end.

Q Do you recall the composition of these lifting hooks that were embedded into these beams?

A The what?

Q The composition. What were they, steel hooks, or--

A Pre-stressed wires.

Q Pre-stressed wires?

A Yes.

Q Do you recall the approximate diameter of these pre-stressed wires?

A I don't recall the diameter, the approximate diameter.

Q In general would you tell us what the operation consisted of? In other words, how did the derrick and the boom position itself and how are these beams or girders raised?

A Well, normal procedure of lifting these beams, they come placed on the scow where you could take a certain one off and lift it up in the air, and then pull in with a derrick and place it. They had to be placed on the scow in sequence for us to pick them up.

Now, the procedure was with this Century with scow alongside she had a big lifting beam attached to it, the Century, and we would swing around with the boom to the starboard side --

Q That would be the right side as you face forward?

A That would be the right side. And the captain would place this lifting beam over to the concrete girders that we was going to pick up. After it was placed, they was lowered down and this lifting beam had two lifting arms on it, on each end, and these four individual straps that come down on each end to hook up these two cables had a three-inch pin in them. And when that was lowered down there would be two iron workers get up on top on one end, two iron workers on the other end, and when this beam was lowered down to where they connect these arms into these pre-stressed cable hookups, they inserted their pins which would be two on each end.

After that was secured there was an iron worker superintendent in the middle of the beam on top of the concrete girder. He would tell the mate to take just a little strain on the load itself. After she had a little strain he would stop everything.

Then the next procedure was to go down on each end, and at each end of these concrete beams there were stanchions at each end, and on the stanchions to hold these girders was two blocks on each side, at each end, just up under your -- just the beginning of the straightaway coming down of the beam.

They were cut -- taken loose. After they were taken loose I would be at which would be the west end aft of the beam with an iron worker, there would be two iron workers up on the other end. When everything was cut loose I would holler to the superintendent that this end was all clear. Then the people at the other end of the beam, they would holler when they had their end all ready and free, and after everything was free and the iron worker superintendent said okay, he then told the mate.

The mate inspected the beam before it was lifted. After that he gave the signals to the captain. Now, what I mean by signals to the captain, he told the captain it was all clear, ready for pick.

On these big derricks you work by a bell system, I mean to give the operator on the derrick the bells to go ahead, or a couple of bells to slack off or whatever it was.

The captain then would give the signals to the operator, and then the operator would pick this beam up, and in the process of picking it up after he was clearing everything, clearing the other beams that were on the scow, he would boom this rig up, and as he was booming that rig up he would automatically swing and he would get -- just trim around nice and slow, and he would get this big beam laying across the derrick itself at the bow.

Then we would take it up to a certain height, I think it was approximately around between forty and fifty feet up in the air. Then everything was stopped, and when she was stopped, we had an anchor on the stern of this scow that had the piling on it. That was aft. We had a line running to the pier. And the reason for that was when we pulled the derrick in between the two piers that the scow would stay practically in the same position it was when we picked up the beam because we didn't have room to get in between the piers with the derrick and the scow, too.

So we pulled in, we pulled over to the far east side and then we had dock builders on top that would guide this beam down and setting it in its final resting place. Then after that procedure was over with the block it was lowered down, we unhooked from it and then we pulled the derrick back on anchors next to the barge again. Pick up another beam to do the same operation.

When you say "we took it over to the bridge", do you mean --

A Well, "we", what I'm talking about that, the mean.

Q In other words, the personnel of the barge Century?

A The personnel, that's what I was referring to.

Q And that was manned by personnel of Raymond International?

A That is manned by iron workers and the deck hands and the first mate and the captain.

Q Of Raymond International?

A Yes.

Q Would you remain on the scow? Would you remain on the scow when the --

A No, I would go up -- I would be aboard the derrick.

Q I see.

A When they were placing the beam. And I would come back with the derrick.

Q Now, if I may, Mr. Comer, you described how the two arms on each side would come down, and I believe you said a three-inch pin was inserted --

A To my recollection, it was a three-inch pin, yes.

Q And that would constitute four pins; is that correct?

A That was four pins.

Q Did your men ever use one pin to go across two loops and catch the middle?

A No, sir, they were separate pins.

Q Now, sir, directing your attention to these beams, or girders, I mean, before they were raised, you said there was a device which held it in place; is that right?

A There was a what?

Q Was there something on the scow which held these girders in place before it was freed and lifted?

A If I get your question right, these beams were all numbered.

Q Right.

A And these beams had to go into a certain place.

Q But before you took slack up on the line, was there something securing the girders?

A The chocks at each end were still in.

Q Would you describe to us what those chocks looked like?

A Well, those chocks, to my recollection, what I remember, were made out of a short piece of 12 by 12, or a short piece of 12 inch "H" beam, and they fit on the flat part of the beam itself at each end.

Now, you have four of those. They were picked up with a bolt, they were bolted onto this stanchion. Before it was on the final pick, the iron workers would slack up all these bolts, and then these chocks would automatically drop,hang on a chain or a piece of cable.

Q When you say the iron workers would slack up on these bolts, in what manner did they do that?

A They did this with a big crescent wrench.

MR. LYSAGHT: With your Honor's permission, may I respectfully ask for the exhibits which were introduced into evidence yesterday referable to the depiction of this device?

THE COURT: Yes.

Q I show you Defendant Bayshore's Exhibits 7, 16 and 17. [Handing.]

MR. LYSAGHT: May I approach the witness, your Honor?

THE COURT: Yes.

Q And I ask you, sir, do these photographs fairly and accurately depict the type of block that was used to secure the girders in question before the lift?

A Yes, sir.

Q Did you hear my question, Mr. Comer?

A Yes.

Q Do these fairly and accurately depict the type of block that was used to secure the girders before the lift?

A No, we took a strain --

Q No, no, Mr. Comer, in general. When the girders were shipped up here, is that type of device that was used to hold them in place?

A It looks something similar to it, but not what I had visions of.

MR. GEEN: I didn't hear that.

MR. LYSAGHT: "It looks something similar to it."

THE COURT: Did you get something after that?

[The answer was read.]

BY MR. LYSAGHT:

Q Did the blocks that were used to secure these girders on the day of the incident look different than those?

A The blocks, as I remember, I could probably show you better on the board than I could --

MR. LYSAGHT: With your Honor's permission, may he --

THE COURT: Yes.

Q Would you do that, please, Mr. Comer? Her Honor said it's all right.

MR. LYSAGHT: May I position the board around, your Honor, so we can all see it?

THE COURT: Yes.

Q What does that represent, Mr. Comer?

A This is an end view of the girder.

Q And end view?

A End view of the girder.

Q All right.

A Now, there's a stanchion here, and this was resting either on a twelve-inch "H" beam, the bottom of it, like so, [indicating] which went clear across the deck. I'd say in five or six places the whole length of the deck. And this was usually made out of, my recollection , a twelve-inch "H" beam.

Then there was a block in the bottom, a chock like this, and the same thing on the other side. [Indicating.] Then up here, this is a little exaggerated, but there was a chock that run through like so. [Indicating] And this was to keep this beam from tipping [indicating].

This had a bolt on it that went through [Indicating], I just forget how the bolt held the thing, but it was unscrewed and taken loose, these four beams.

Now, that's the best of my recollection that they were chocked. Because this has been five years, almost five years ago, and it's pretty hard to remember. But, to my recollection, that's how they were chocked.

Your picking loops are like that. [Indicating.] Of course they were embedded in the concrete. They were embedded more in this area here, like this. [Indicating.]

This extension here, when we first set the one it had part of the deck already on it, and when we placed the other one to it, you only had an area of about nine inches that had to be filled in later on to complete a whole deck.

In other words, these beams come with part of the deck already fabricated right on it.

MR. LYSAGHT: May I ask the witness a question, your Honor?

THE COURT: Yes.

Q How close to the end of the girder were these lifting devices, or loops situated?

A Well, as I recall they were placed roughly, I'd say within two feet of the end of the girder.

Q Now, sir, when slack was initially taken up on the lifting boom would those chocks remain in place?

A They remained in place until we had just the slack taken up.

Q Then what would happen?

A Then the next procedure was to take these blocks out.

Q That drawing that you have shown is like a cross-section of the beam. In other words, if I were standing at one end of the beam I would be facing down; is that right?

A That's right.

Q Directing your attention to this "T" shaped depiction of the beam with reference to the stem of that "T", how wide is that stem?

A Approximately two feet.

Q On the date in question at the time of the casualty, where were you standing with reference to the beam?

A I was standing --

Q Or, the girder, I should say.

A I was standing about three feet behind the end of this beam, [indicating] which would be west.

Q And if you faced the beam, could you see all the way down to the end?

A Yes, I could.

Q When the slack was taken up were the blocks removed?

A When the slack was taken up -- you're talking about when it was ready for the final pick?

Q It was ready for the final pick, I'm sorry.

A The blocks were already out, yes.

Q And you were standing about three or four feet from the edge?

A From this end, the west end. [Indicating.]

Q When the blocks were freed at your end, what did you say?

A I would say it was all clear.

Q Could you see down to the other end?

A I could see down the one end that I was standing on, then I would go to the other side, I could see down at the other end.

Q Who would free the blocks first, your end or the other end?

A Well, it all depends on how much trouble you had getting them out.

Q I see.

A I mean, probably sometimes work one end would come first, then the other end.

Q If your end was freed first, would you then shout to somebody?

A Yes, I would, I'd ask them how they was making out.

Q Well, would you indicate to someone that the blocks on your end were free?

A Yes. The end I was standing on, the minute they had these blocks all free, I would holler to the iron worker superintendent that this end was all clear.

Q Now, sir, on the morning of this casualty, when this particular beam failed, had you signalled that your end was clear?

A Yes, I had.

Q Was it actually clear at your end?

A It was.

Q Could you see down to the other end from where you were standing?

A Yes, I could.

Q Was it free at that end?

A That's right.

Q Did you hear someone shout or exclaim that it was free at that end?

A Yes, I heard the men holler that it was free at that end.

Q What happened after that?

A Then the mate inspected the beam and he found that everything was clear, then orders were given to the captain to start picking the load.

Q And the captain, was he aboard the scow or aboard the Century?

A The captain was aboard the Century.

Q And he would then communicate with the engineer to raise it?

A That's right. He would give the signals to the engineer.

Q Now, sir, would you tell us what happened that morning when the beam failed, the girder failed? Would you tell her Honor what happened that morning?

A Well, your Honor, whenever everything was all clear, as I said before, I vouched for this end being clear to my visual inspection and by their verbal words the iron worker superintendent from the other end, it was all clear, the mate made an inspection and he found that it was all clear ready for a pick. So he relayed the signals to the captain on the barge, which was prepared to give the operator the signal.

They started to take a strain on it and I was standing, well, I moved back about, I guess about four or five feet from the beam, and that was a natural position when we pick all of them to see if she was coming up free and clear.

Well, we started to get a pretty good list on the barge while she was in the process of picking up. What I mean by the barge is essentially when she was picking it up, she would list. To my recollection at my end, we had this one end of the beam off its resting bed I'd say approximately an inch and a half, and about that far this one strand, this one hook up here parted. [Indicating.]

Q Are you indicating the lifting loop on the left as you face --

A The lifting loop on the girder itself parted. Well, when it parted, it scared me to death. I was really scared. And then in a matter of seconds this one parted --

Q You are indicating the one to the right?

A The one to the right parted. And then naturally the other two on the other end let go and we had a lift on the derrick which was lifted this way [indicating], and when that parted, we had the list of the barge, we had to swing around, she had come back up to her natural position, the derrick itself, and this girder was swinging around in the air, and finally it stopped.

Q You are referring to the lifting beam?

A Yes, on account of the strain we had on this.

Q Did that come in contact with portions of the Century?

A It came in contact, it hit this Century, it had what they call an "A" frame on it and then she had big legs that come down and she had, as far as I can recall, she had three, one on each side, and one in the stern, and she come around and she swung around and hit one of these stays on there and it done considerable damage to the derrick itself.

Q All right, sir.

MR. LYSAGHT: With your Honor's permission, may the witness resume his seat?

THE COURT: Yes.

Q I believe you testified that you had previously lifted about 200 or some odd beams previously during this operation using the same type of procedure?

A No, I hadn't lifted that many. There were approximately that many lifted.

Q Right.

A With the barge.

Q Was the same procedure used?

A Yes, it was.

Q On the morning of this casualty had you folks lifted any other beams before this occurred?

A Yes, we had raised two beams to my recollection.

Q In other words, you had lifted two beams off the scow and placed them over on the bridge; is that right?

A Yes.

Q Had you used the same procedure?

A Yes, our same procedure. It was the same thing.

Q What was the weight of these girders, sir?

A These girders went approximately 130 ton.

Q Direct your attention to the derrick Century. Did that have any ballast on it that day?

A No, no ballast.

Q Could you give us an approximate estimate of the height of the Century above the water?

A Well, to my knowledge, if I remember correctly, when the derrick was floating without a load on it, she was drawing nine feet of water. That's nine feet out of the water. And from the water line up there was approximately another nine feet.

So, when we swung around to hook on these beams it was to boom out to get the last beam on the scow and pick it up, you would have quite a list off of the starboard side. And she would be kind of in a cocked position.

The stern would be just about taking water on the starboard side aft.

Then as we brought the beam up after we had the full load that would be about her regular position bringing up a full load, and as we picked the beam up and boomed up with it and then trim around the aft end and the starboard side would finally start coming up till she -- we got the beam in the middle of the deck and then it would level itself off.

Q Do I understand you to say that the deck of the Century when you had the full load of 130 ton would be just about even with the water?

A It was just about even with the water from coming over the deck, to stern.

Q Sir, at the time of this casualty, immediately before the strap broke, did you observe the position of the deck of the Century with reference to the water?

A Yes, I did.

Q What was it?

A When we had the full load on it, the position of the Century is the stern in the aft on the starboard side was just right at the water's edge, water level.

Q At the time this particular girder broke, just before it broke, what was the position of the stern of the Century with reference to the water?

A Well, I'd say she was -- she lacked about six inches before she had the full load on to be at a level with the water.

Q Do I understand you to say then it was about six inches above the water before the cable broke?

A That's right, about six inches.

Q Mr. Comer, after this cable snapped and the lifting beam started swinging around, did there come a time that ultimately the lifting beam came to rest?

I'm sorry, you probably didn't hear me. I am dropping my voice and covering my mouth.

After the wire broke and the lifting beam hit portions of the Century, did there come a time that everything ultimately stopped?

A Yes.

Q Did you remain there near the beam when this happened, or did you seek cover, or what?

A No, I started to run and tried to get overboard but I couldn't make it. There was a deckhouse on the scow.

Q Did you go into the deckhouse?

A I ran into it, yes.

Q But there came a time that everything ultimately evened out; is that right?

A Yes.

Q Was this particular girder that failed, was it ultimately raised by using a different method?

A It was, yes.

Q Who ordered that?

A Our project manager and myself talked that over.

Q Now, after the -- I'm sorry, did I interrupt?

Now, after everything quieted down, did there come a time that you expected the strands of the wire, the loop that failed?

A Yes. There was a time where, I'd say two or three hours after, approximately two or three hours after the accident happened, we went up there with cold chisels and ball peen hammers and we dug around four of those --

in four areas there where the wires were broken and we got down about an inch and a half.

Q When you dug down about an inch and a half, what, if anything, did you observe?

A What did we find?

Q Yes.

A Well, we found a rusty condition on the pre-stressed wires.

Q You told us that as you faced the girder, you initially observed one lifting device break first; is that right?

A Yes.

Q Did you dig below the surface of that particular --

A Yes, we did.

Q Did you dig below the surface of any of the other lifting devices on that particular girder?

A Yes. As I say, in four areas there on each end we --

Q Were there other girders on that particular scow that had not as yet been lifted?

A That's right. That's correct.

Q Did you dig into the concrete below the concrete surface?

A There was one that I remember there that we inspected in a couple of places.

Q What did you see there?

A We found the same condition, rusty. That the pre-stressed wires were rusty.

Q Was that below the surface of the concrete?

A It was about an inch and a half below.

Q As a result of that, did you and the project manager order that the beams be lifted in a different manner?

A That is correct.

Q What did that manner consist of? Would you show her Honor?

MR. LYSAGHT: If I may, your Honor, with your Honor's permission, may I ask him to draw another similar depiction of the "T" so he won't mar this one?

THE COURT: Yes.

Q Mr. Comer, would you draw another one like this over here and show her Honor?

A Yes. After this accident happened, what we did was went up, and this section here is part of the deck [indicating], this is what we call the slab of the bridge. [Indicating]. We went in up here and we cut out about an eighteen-inch hole right out of the deck, cut it right out. Then we took these big, to my recollection they were an inch and a half endless pennants made out of wire steel cable, and they were like this, [indicating] they were endless cables.

So, we took these cables and we doubled them and we brought them down right through the bottom of the beam and right back up again, and that's the way these looked, these big cables. [Indicating.]

In other words, we cradled each end of it. Then your lifting iron comes down this way [indicating], and they fit right into the cable with a bolt just the same way that you would hook on these here. And we used, after the accident, we used this type of method all through the job, the completion of the job.

THE COURT: Did you bore holes in the deck as well as the bottom?

THE WITNESS: Yes, ma'am. Up at the top --

THE COURT: No, in the bottom also.

THE WITNESS: No, ma'am, it was slung right underneath.

THE COURT: I see.

THE WITNESS: It was slung right underneath.

MR. LYSAGHT: May I proceed, your Honor?

THE COURT: Yes.

BY MR. LYSAGHT:

Q By the way, these girders were shipped up from

Bayshore's plant; is that correct?

A That's correct.

Q How long was the trip up from Cape Charles, Virginia, to the site of the occurence?

A Well, I never kept a really true record of it, because I had other stuff to do. But my recollection there is it was around a two and half to three-day tow depending on the weather.

Q And once it arrived at the site up here in Rockaway near the bridge site, would it remain there any length of time?

A They would probably. I'd say a day at the most.

Q Before they were placed on the bridge?

A Yes.

MR. LYSAGHT: I have no further questions, your Honor.

THE COURT: All right. We will take a ten-minute recess.

[Recess.]

THE COURT: You may proceed.

MR. FISH: Shall I carry on, your Honor?

THE COURT: All right, you have concluded your direct examination, Mr. Lysaght?

MR. LYSAGHT: Yes, your Honor.

THE COURT: All right, you may proceed.

MR. FISH: Shall I carry on, your Honor?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. FISH:

Q Mr. Comer, in lifting, say, 200 of these beams with the use of the Century, is it fair to say that you had established a routine usual procedure in the method that you used?

A That's right, yes.

Q At the time that T-205 broke loose in the course of lifting that until it broke loose, was there anything out of the usual as compared with your usual procedure?

A No,sir.

Q You said that the captain of the Century brought this lifting beam over the concrete girder in position so that they could lower it down and then make connection with these lifting loops?

A That's correct, yes.

Q And after connection was made, then the captain took a strain on it?

A Just what I call by strain, just took the slack out.

Q Took the slack out?

A Yes.

Q Tautened everything up?

A Yes, sir.

Q From that time until everything went and broke loose and carried away, how long was that period of time?

A You mean until we got the chocks out?

Q No. From the time that you made the connections and took all the slack out of the falls so that there was some strain on there, from that time when you had it taut until she broke away, what was the lapse of time?

A I couldn't answer that question, because the chocks had to be taken out.

Q How long did it take to take out the chocks?

A Well, I would say it would vary from 15, 10 to 15 minutes.

Q You have described to some extent this device at the end of the lifting arm, you had four lifting arms from your lifting beam. As I understand it, each arm came down, then spread out like an inverted "U" into a couple of plates which fitted over the lifting load?

A That's correct.

Q There was a pin that passed through one plate through the loop and through the other plate?

A That's right.

Q Was there any other device or piece of mechanism at that point?

A At the four areas where you inserted these bolts through the lifting arm, there was what we call a spacer. It was a kind of an oblong thing that went in between. In other words, it threaded, the bolt threaded through that so the lifting cables itself wasn't bearing on the bolt, it was bearing on the round surface. That was what we called a spacer.

Q And that bolt that you now call it, was what we have previously called a pin?

A Yes, sir.

Q Can you sketch that mechanism for her Honor?

A You mean the pin?

Q The spacer, whatever you call it.

A Well, the spacer, as I recall it, is a, say, your distance in between was roughly four inches, and to my recollection it was a piece of heavy duty pipe, a four-inch pipe, and when you inserted your bolt through these two arms, this pin was put in under your connection there and your bolt threaded through that so in other words, that served the same as the bolt did. Only the bolt was in there for your strength.

Q It formed a collar around the bolt?

A It formed a collar around the bolt.

Q And increased the diameter of the bearing?

A That's right.

Q Can you make a sketch of that?

A Well, you had this lifting arm that come down like this [indicating], then there was a -- there were holes bored through this [indicating.] What I am talking about, the pin was three inches o.d., which is outside diameter, and --

Q Draw the pin.

A And the pin went right through here. [Indicating.] Then in between these two pieces here, this inside piece of this arm and the inside piece of this arm there was a collar. So, when your what-you-may-call-it, your cable come down here, your hookup cable was like this, you had one arm coming down through and another one coming down through, then you come right through them. [Indicating.]

Do you get the picture?

Q Well, this is an end view?

A Yes, that's right.

Q And show the cross-section of the lifting loop as it passed over that column. Where would that be? Right on the diagram you have shown, draw in the diameter of the lifting loop on that device that you have just drawn.

A Well, your diameter, and then your pin went through it this way [indicating.]

Q That is the collar itself?

A Yes. This is the collar, then your pin goes through. [Indicating.]

Q I see. Sort of an oversized washer?

A That's right.

Q A very thick washer.

A Yes.

MR. FISH: Does your Honor understand the device, or shall I have him describe it for you?

THE COURT: Yes, I think I understand it now.

MR. FISH: All right, that is all I have, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. GEEN:

Q Mr. Comer, I understand that you have some difficulty hearing.

A Yes.

Q And I have been told I have a low voice. I will do my best. If you don't hear me, tell me, and I will repeat it.

A All right.

Q Okay?

A Fine.

Q What is the business of Peter Kiewit?

A Peter Kiewit is in heavy construction.

Q You as project manager had been in heavy construction?

A That's right.

Q That involves steel construction as well as concrete construction; is that right, sir?

A That's right. Yes, sir.

Q So you, sir, have had experience in the field working with steel? Did you hear me?

A Yes, I did.

Q Can you answer that question?

A Yes, I did have experience.

Q That would be rebars and all kinds of metal?

A That's right.

Q As a matter of fact, this precast concrete girder had all sorts of metal rebars projecting from it?

A That's right.

Q And it is the normal expected ordinary experience that when you see these rebars and this metal in the field that it has coatings of rust?

A That's correct.

Q As a matter of fact, sir, I show you Defendant Bayshore I in evidence. Would you look at this, sir, please? [Handing.]

A Yes.

Q This shows rebars that are projecting?

A Yes.

Q There is rust all over it?

A That's right.

Q And that is a normal --

A That's right. That's correct.

MR. GEEN: May I show your Honor? [Handing.]

Q Now, several times when Mr. Lysaght and Mr. Fish were asking you questions you mentioned that this occurred five years ago.

A Yes.

Q And you often said, to the best of my recollection now.

A That's correct.

Q Have you used anything, any written material, any statement to refresh your recollection before you testified here today?

A No, sir.

Q Are there some parts of your memory that are now hazy?

A No. It's perfectly clear to me right now.

Q All right. Now, you told us that you examined these lifting loops.

A That's correct.

Q I believe you told Mr. Lysaght, however, that you could not give him the diameter of the lifting loops?

A No.

MR. GEEN: This has not been previously identified, your Honor. Can we mark it for identification? I believe it will be Defendant Bayshore Exhibit XXII.

[Defendant Bayshore Exhibit XXII marked for identification.]

Q Mr. Comer, I show you Exhibit XXII and I ask you, sir, to look at it, please. [Handing.]

A Yes.

Q Is that a cross-section --

A That's a cross-section.

Q [continuing] -- of the lifting straps that were imbedded in this concrete?

A That's correct.

MR. LYSAGHT: Your Honor, if I may. Is the proffer of proof that that was one of the lifting loops that were embedded, or a type?

THE WITNESS: This was a sample.

MR. GEEN: I'm not sure I understand what you are -- you mean, am I claiming that this was the exact one? No.

MR. LYSAGHT: The question sounded that way, just for the record.

MR. GEEN: No. If I wasn't clear I am not asking Mr. Comer if this was one of the lifting loops actually embedded. I am talking about as a sample.

THE WITNESS: A sample.

BY MR. GEEN:

Q Yes. They look like this?

A Yes.

MR. GEEN: All right. I offer it in evidence.

THE COURT: Is there any objection?

MR. FISH: I do object. I think it should be properly identified, your Honor.

MR. LYSAGHT: I fail to see its relevancy, your Honor.

THE COURT: Well, he said it was a sample. Do the lifting loops actually look like that?

THE WITNESS: Yes, ma'am. It's not the actual one, it's a sample.

MR. GEEN: I don't claim it is the actual one.

THE COURT: Overruled.

[Defendant Bayshore Exhibit XXII received in evidence.]

BY MR. GEEN:

Q Looking at XXII, Mr. Comer, could you tell me was not the lifting loops composed of three separate strands of cable or wire?

A To my recollection it was, as far as I can remember. And what I can remember.

Q And each individual one of those three separate strands was itself composed of separate wires which were twisted together?

A That's right.

Q Do you know, if I said that each one, each of these three separate pieces of cable contain seven individual wires twisted together, could you tell me whether that was correct or not?

A Would you repeat that last part?

THE COURT: Let the Reporter read it.

[The question was read.]

A Well, according to when I made my visual inspection, that's correct, yes.

THE COURT: May I see that? Would you hand it up, please?

MR. GEEN: Yes, your Honor. [Handing.]

Q Now, these three separate strands of cable on the top of this "U" shaped loop that was formed once it was embedded in the cable, it had a covering, did it not?

A Yes, it did.

Q And was the covering -- again here you are only seeing a portion of it?

A Similar to that.

Q Does this have a name, this casing?

A I don't know what you would call it. What it's usually known as is a softener.

Q When this loop was used -- when I say this loop I don't mean this particular one, but when the loops were used it would be raised by use of the softener; is that correct?

A Yes. Yes. It's a protection for the wires.

Q Mr. Comer, on direct examination you described for us the listing of the Century.

A Yes, sir.

Q When the Century is listing under a load, is the barge or scow --

MR. GEEN: Withdrawn.

Q Is there any difference between the use of the term barge or scow? Are they used interchangeably?

A Well, you use either one. The derrick is sitting on a barge, and the scow is just a plain barge without a derrick on it. It's a flat decked shell.

THE COURT: Well now, we have been referring to the Century as a barge and the scow as the vessel which contained these girders; is that right?

THE WITNESS: Yes, ma'am.

THE COURT: All right. Now, let's stick to that. It is confusing enough without switching these names. Let's try to use the same term each time.

MR. GEEN: That is why I asked, so I would get my terms correct.

Q While the barge then is listing under a load, is the scow listing in the opposite direction?

A It all depends. When you take a beam off of it, you are taking some weight off of the scow. And she'll list one way or the other when you take one of those beams.

Q So you had described for us the listing of the Century, but during this procedure of taking off a heavy girder, concrete girder, the scow itself is also listing?

A That's right.

Q You stated on direct examination that the barge will list to an abnormal degree if the derrick exceeds its capacity. Your exact words were, "Exceeds the rate of capacity of the derrick."

MR. LYSAGHT: I object to the form of the question, your Honor.

THE COURT: Just a minute, Mr. Comer. What is your objection?

MR. LYSAGHT: May I have the question read back, your Honor?

THE COURT: Read the question, please.

[Question was read.]

MR. LYSAGHT: Objection withdrawn, your Honor. I did not hear the word "abnormal".

A I still don't get that question that you're firing at me.

THE COURT: The question is: Was that your testimony? Is that what you testified before on direct examination here?

THE WITNESS: Well, I wouldn't say it's my testimony until I understand clearly his question that he is putting at me.

Q All right, then let me reframe it because when Mr. Lysaght was asking you this question I wrote down your answer.

A That's right.

Q And I heard you say --

A A little louder, please.

Q All right. I heard you say, sir, that if the derrick exceeds its lifting capacity you will have an abnormal amount of list to the barge.

A That's right.

Q What's the listing capacity of the derrick?

A The lifting capacity of the derrick, as I understand, she was insured for, was four hundred and some-odd tons, approximately.

Q There has been testimony here by a man, I don't recall his name at the moment, who was involved in the design of the Century who testified the derrick's capacity was 500 tons. Would you quarrel with that, sir?

A I would not. I said a little over 400 tons.

Q This particular girder where there was a failure of the loops, did it have a particular number?

A Yes, it did.

Q Was that T-205?

A That's correct.

Q When this scow came the Century before any girders were taken off, were there five?

A To my recollection there were five girders.

Q And two were taken off before the attempted lift on T-205?

A That's correct.

Q Now I show you Defendant Bayshore Exhibit XXI marked for identification, sir, and I ask you as a front view of the five girders before any were lifted off, if that's how it looked. [Handing.]

A Well, this is how it looked when we got it into the derrick.

Q Yes, that is what I meant.

A Yes.

Q You will see on this drawing, sir, there is writing.

A Yes.

Q It indicates two girders.

A That's right. That's correct.

Q And this is a correct and accurate diagram?

A Yes.

Q And this shows where the T-205 which was to be lifted was?

A Yes, sir.

Q So this is a fair and accurate drawing?

A Yes, sir.

MR. GEEN: I offer it into evidence.

THE COURT: What is that number?

MR. GEEN: This is XXI, your Honor.

MR. FISH: No objection, your Honor.

THE COURT: All right, let it be received.

MR. LYSAGHT: No objection, your Honor.

[Defendant Bayshore Exhibit XXI received in evidence.]

BY MR. GEEN:

Q Mr. Comer, on the diagram that you drew on the blackboard, as far as the girder itself is concerned, I believe you testified that across the scow, the floor of the scow, there was an "H" beam?

A "H" beam, or a 12 by 12 trimmer for a resting board, yes.

Q So that the girder was not resting on the floor of the scow?

A That's correct.

Q Whether it was an "H" beam or --

A No. 12 by 12 timber.

Q Yes, whatever it was.

A Some of them had beams and some had --

Q Did this continue the entire distance down, you know, one piece after another resting sideways?

A No, sir. Different spacing. Different spacing.

Q There was openings?

A Yes, sir.

Q So that the --

A I would say over the entire area there was about six of them.

Q So that at least theoretically a cable could have been placed underneath because there was room to get it underneath and wrapped around the top of the --

A Yes, there was room for a sling. Sure.

Q Were you on the job the day after this occurrence?

A Yes, I was on the job the day after.

Q When you went on the job that morning where did you go?

A Well, the first place I went to?

Q Yes.

A Well, that's pretty hard to remember what I did the first thing.

Q All right. Well, did there come a time anyway when you got out to the scow?

A Yes, there come a time when I went out.

Q Was the scow still out by the bridge that was being erected?

A That morning it was still out alongside.

Q Did it stay there for some period of time?

A It stayed there for a period of time, yes, sir.

Q Could you tell us --

A I don't recall how long, but it was there for a period of a day or so.

Q It was?

A Yes.

Q A day or so after the day of the occurrence?

A Yes, sir.

Q It was not towed into a pier the day of the occurrence?

A Not that day, no.

Q After the occurrence, on the day of the occurrence, do you recall approximately what time of the day it occurred?

A Yes, sir, around 10:45.

Q Was any further work done on the scow that day?

A Not to my recollection, no, sir.

Q Was everything left the way it was?

A Yes, sir.

Q And the next morning was there work done on the scow?

A There was work done on the scow, yes.

Q And that work, that is when the chipping started on the --

A When we started chipping holes there that I showed for those endless cables.

Q Do you recall approximately what time of the day that started?

A No, I couldn't.

Q Was anything done to the girders at all, anything whatsoever, anything you can think of?

MR. LYSAGHT: I will object to the form of the question, your Honor. Does he mean with reference to lifting them and placing them on the barge?

MR. GEEN: I haven't finished my question.

MR. LYSAGHT: I'm sorry.

THE COURT: All right, let him finish.

Q Was anything done in regard to those girders the day after the occurrence, and I mean anything, besides the chipping of holes for receipt of the cable?

A Yes, that's right.

MR. LYSAGHT: I object to the form of the question, your Honor. It depends on what he means by "anything". Were they physically moved, is that what he means?

THE COURT: Other than the chipping of holes. I think the question is clear.

Q Were the conditions on that scow changed --

A There was work done on the scow, yes.

Q But were the conditions changed in any fashion except for the chipping out of the concrete?

A No. All we did was chip the holes for those endless cables.

Q This may sound like a silly question, Mr. Comer, but before this lifting loop parted, would it be fair to say you didn't expect an accident to occur?

A No.

Q And you had done this procedure and gone through this procedure on many other of these girders and this lifting operation?

A That's correct.

Q When you testified this morning, you were telling us the procedure that was used in lifting these girders, that you recall that numbered somewhere between 200 or 300.

A That's correct.

Q When you were shown Bayshore's Roman numeral --

MR. GEEN: Excuse me. Withdrawn. Did you show him both of these, Mr. Lysaght?

MR. LYSAGHT: I believe that did, and I showed him a snapshot as well. VII, XXI and XXII, I think.

Q I believe Mr. Lysaght showed you Bayshore Exhibit XVII, XVI and VII in evidence. [Handing.] Is that right, sir? He did show you those?

A I have seen them before, yes.

Q And he asked you whether that is the way the blocking looked and was secured to the girder, and I believe you said, I didn't visualize it that way; is that what you said?

A According to my recollection that's the way it was, yes. The way I had it up there.

Q The way it's shown on those pictures is the way it was?

A This picture right here. [Indicating.]

Q Well, what about those black and white ones?

A Well, this is all -- yes, that's the best way. That's what I said, just the way I got it up there on the board. Wooden blocks in there to hold them.

Q By the way, can you tell us whether or not, if you can, those were the exact wooden blocks that were used to secure the beam T-205 in question?

A No. No.

Q Not, it's not, or no, you couldn't tell?

A No.

Q No, it's not or you could not tell?

A I could not tell. I wouldn't say they were the same.

Q You testified, when Mr. Lysaght was questioning you this morning, that the bolt securing this block to the side of the girder would be loosened and the block would fall away.

A The block would fall away, and it would fall on a hangar, a chain was provided for it.

Q Is that the way it was done on this girder T-205? It was loosened --

A As far as I remember it was, yes.

Q It was loosened?

A That's correct.

Q And it fell away?

A That's right. Fell away.

Q And that is the whole procedure?

A That's correct.

Q And you have described the whole procedure, no other tool was used.

A Yes.

Q Is that correct?

A That's correct.

Q And this block was not nailed in any fashion to the apparatus that was holding it; is that correct?

A Not nailed, no.

MR. GEEN: Do we have any kind of a marking pencil? With the Court's permission, may I put two marks on Defendant Bayshore's Exhibit XVI in evidence?

THE COURT: Yes.

Q Mr. Comer, I ask you to look at the area where I made those two --

MR. LYSAGHT: With your Honor's permission, may we approach and look as well?

THE COURT: Yes.

Q Mr. Comer, I ask you, isn't it a fact that these blocks were nailed and secured by nails to this apparatus that was holding it?

MR. LYSAGHT: Objection, your Honor.

A No.

THE COURT: Is there an objection? He has already answered the question anyhow.

MR. GEEN: I didn't hear what he said.

THE COURT: He said, "No." Is there an objection?

MR. LYSAGHT: Yes, your Honor. My objection was based on relevancy. In other words, is it his contention that this is a view of the blocking that was holding the beam in question?

MR. GEEN: Is it my contention?

MR. LYSAGHT: Yes.

MR. GEEN: The witness can't answer it. But you want to know if I want to contend that?

MR. LYSAGHT: Yes.

MR. GEEN: Yes, sir.

MR. LYSAGHT: In other words, your Honor, my --

THE COURT: You are contending, Mr. Geen, that the nails were there? Do you want to point it out on the blackboard, or -- you have marked it here. All right.

MR. GEEN: Yes, your Honor. [Handing.]

THE COURT: All right.

BY MR. GEEN:

Q These blocks of wood, were they held in a seat?

A Yes, they were held in a seat.

Q Was there a side piece of metal that went on the side of the block?

A Yes.

Q Did that piece of metal have holes in it?

A Well, I couldn't tell you that.

Q Weren't there holes on the side of this piece of metal that held the side of the blocks that had holes in which nails had been driven into the blocks?

A There's no holes in the plate.

Q Now, it is your recollection there are no holes on the plate?

A No holes in the plate. You could see them bent over there, see?

Q Could you identify --

MR. LYSAGHT: Your Honor, could he finish his answer?

THE COURT: Yes.

MR. GEEN: I'm sorry.

Q Finish your answer, Mr. Comer.

MR. LYSAGHT: Finish your answer.

A I refuse to answer that one.

MR. LYSAGHT: Wait a minute, Mr. Comer.

THE COURT: No, you can't refuse to answer. You were saying there were no holes in the plate obviously because the nails are bent; is that your testimony?

THE WITNESS: What I meant, there's no holes in the plate, your Honor, the nails were clinched over.

THE COURT: Well, that is what I am saying. That was, I thought, the essence of your testimony, that the nails were bent, which indicates there could not have been holes; is that it?

THE WITNESS: That's right.

MR. GEEN: Your Honor, I have marked two separate spots in red. With the Court's --

THE COURT: Let me see the other one.

MR. GEEN: I think your Honor saw this. [Handing.]

THE COURT: I see.

MR. GEEN: May I mark them "A" and "B" so we can distinguish between the two marks?

THE COURT: Yes. All right.

MR. GEEN: I have marked the first one from left to right, "A", and the next one "B".

Q I ask you to look, Mr. Comer, at mark "A" and the object shown in mark "A", and I ask you, sir, doesn't that show a nail through the metallic portion into the block? [Handing.]-

MR. LYSAGHT: I believe "A" -- I will withdraw it. May we have an answer?

MR. GEEN: Yes. He believes "A".

MR. LYSAGHT: Did he answer it, your Honor?

THE COURT: Did you answer?

MR. GEEN: Yes.

THE WITNESS: No. No. I didn't answer.

THE COURT: Mr. Lysaght said, "I believe 'A' ", and then he withdrew it as his objection.

MR. LYSAGHT: The reason I said that was the witness was pointing at "B".

Q Do you understand what I'm asking you about "A"?

A Yes, I understand what you are asking.

Q All right.

A It shows that on the picture.

Q Well, that's what I am asking you about, the picture.

A You confused me. I told you one was bent.

Q And the other is through the metal.

A And the other is through the metal.

Q So now, sir, would you say that there was an opening in that metal?

A The picture shows there is an opening in it, yes.

THE COURT: Well now, are you --

Q Isn't it a fact --

THE COURT: Just a minute. Are you asking him whether this is what obtained on the day of the accident, or are you just asking what that picture shows?

MR. GEEN: Well, the witness has previously stated that while he [illegible]d not say that this was the blocking on T-205, it looked like any other blocking to him, he said that this picture was a fair and accurate representation of the blocking that was generally used for the securing of these girders.

THE COURT: All right.

Q Isn't it a fact, Mr. Comer, that in the operation of lifting these girders that the clamp holding these blocks against the girders were sometimes loosened and the block did not fall free?

A To my recollection, every beam that was lifted under my inspection the blocks were free.

Q The loops, you described how these two loops went first one over the other; right?

A Yes, sir.

Q What happened to those lifting loops?

A One of them parted.

Q No, no. I mean after. What happened? Did anything happen to them? Were they removed?

A The ones that let go? No, sir, they were not removed.

Q They were never removed?

A No.

Q What about the two on the other side, on the far side from where you were standing, were they ever removed?

A Not to my knowledge, they were not removed, no.

Q Were you involved in the lifting of that girder after the alteration was made to it?

A That's right.

Q Is it your testimony, sir, that when it was lifted at that time those broken loops were still on that girder?

A As far as I could remember they were still there.

Q Is there some doubt in your mind?

A Sir?

Q Is there some doubt in your mind?

A The only time they were cut loose, those that were cut, is when they were placed on the deck in its final position after they had broke.

Q I'm not sure --

A Then they were cut.

Q I am not sure I understand what you mean, sir.

A As far as I can remember, we didn't disturb those broken strands at all. After the accident and everything and this beam was brought up in place, in its final resting place, these strands on practically all of them had to be cut off on account of they would protrude through the road surface.

Q To the best of your recollection, that's when you think this was cut?

A Yes.

Q Do you know what happened to them?

A What?

Q Do you know what happened to them?

A No.

Q By the way, you say that you were there the next day, the morning of the next day, and you're not sure of what time?

A Sometime in the morning I was out there, yes, sir.

Q Were you on the barge?

A I was on the barge, yes, sir.

Q Were you on the scow?

A I was on the scow, yes, sir.

Q While you were there --

MR. GEEN: Mr. Thibodeaux, or would you stand up, please?

Q Did you see Mr. Thibodeaux?

A I believe. He looks familiar to me.

Q Do you remember seeing him there that day and he had a camera?

A That I couldn't say.

MR. LYSAGHT: What day was that, your Honor? What day is that?

MR. GEEN: The morning after.

MR. LYSAGHT: Your Honor, I didn't ask for any historionics of Mr. Geen. I respectfully asked the bench if I could ask Mr. Geen what day it happened.

THE COURT: He said the day after.

MR. GEEN: Did you mishear me? I said the morning after.

Q Did you see anybody else there that day making an examination of these loops?

A Not to my recollection. I don't remember seeing anybody.

MR. GEEN: I have no further questions.

MR. LYSAGHT: Redirect examination, your Honor?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. LYSAGHT:

Q Mr. Comer, these girders, were they larger at the top than they were at the bottom?

A Yes, sir.

Q Without being secured by blocks could they tip over if the boat listed?

A They wouldn't tip over, because they would hit the upright post there that I have shown on there.

Q The uprights that would secure them?

A Yes. They would keep them from tipping, yes.

Q After this casualty were the uprights put in position and the girders resecured?

MR. GEEN: I object to the form of the question.

THE COURT: Well, ask him what occurred with respect to the uprights after the accident.

Q After the casualty, sir, did anything occur with reference to the uprights to resecure the girders?

MR. GEEN: I object to the question.

A No.

MR. GEEN: I withdraw my objection.

THE COURT: All right.

Q Were you on that scow all day?

A I was on the -- after the accident I was off in the afternoon for a couple of hours.

Q Do you know what happened in the afternoon?

A Well, yes, the afternoon there we had people coming out from Bethlehem there looking at the derrick Century.

25 Q Was anything done the following night or the next morning to resecure the beams?

A No, sir. It would sit there by itself.

Q Were any chocks placed in position?

A Not to my knowledge, no.

Q Were you there at night?

A No, sir.

Q Directing your attention, sir, to this object which has been marked Defendant Bayshore Exhibit No. XXII in evidence, and specifically directing your attention to the casing --

A The softener, yes.

Q The softener, was that put in place by Bayshore?

A It was, yes.

Q In other words, this object came in place with the girders when they were shipped up?

A That's correct.

Q Now, sir, I believe you stated that the derrick had a maximum lifting capacity of about four or five hundred tons; is that right?

A That's right.

Q And in order to lift four or five hundred tons would ballast have to be placed on the derrick?

A Yes, we used ballast.

Q Would you explain to us what ballast means? Can you draw a picture of it?

A Well, I could explain better than I could draw a picture of it.

Q All right.

A One side of the derrick, the barge, she lifts -- she lifts mostly from the starboard, lifts her load from the starboard, and you have big water tanks in the hull on the port side, and the water is pumped in by two big pumps, centrifugal pumps. I forget how many gallons per minute they can put in, but they use that when they are lifting an extremely heavy load, and that's -- what that is for is to compensate for the list that you are taking on the starboard side. Just like a counter balance.

THE COURT: Yes.

Q I believe, sir, you testified that since this was 150 ton lift, there was no ballast; is that correct?

A There was no ballast used for them, no, sir.

Q Now, if you were lifting a three, four hundred or five hundred ton lift, would you use ballast?

A You would use ballast, yes, sir.

MR. LYSAGHT: No further questions, your Honor.

THE COURT: Anything further?

MR. FISH: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. FISH:

Q I believe you said that you have not reviewed any statement that you previously signed before coming in here to testify; is that correct?

A Yes, I stand on that.

Q Is that a copy of the statement that you made sometime after this accident? [Handing.]

A Yes.

Q Is that your signature on there?

A On both of them, yes.

Q Under what circumstances was that statement taken, do you recall?

A I made it up myself.

Q Do you recall when this was done?

A I would say it was the next day after the accident.

Q I call your attention --

A The accident was the 28th.

Q This says May 26th, 1970. The accident was when? I think we have established it as April --

A April the 28th, if I remember right.

Q And this was taken May 26th, so that would be a month afterward?

A I don't see where you have the date on here. Yes, I guess that's correct.

Q Is that your handwriting?

A That's right.

Q At whose request did you make out this statement?

A The company's request.

Q Kiewit?

A Kiewit, yes.

MR. GEEN: Are you offering it into evidence?

MR. FISH: Yes.

MR. GEEN: The only time, as I understand it, a statement can be offered into evidence is in the impeachment of a witness. Is Mr. Fish offering this as a prior inconsistent signed statement?

MR. FISH: To the extent this is inconsistent with his testimony, the answer is yes.

THE COURT: No, you have to point out the inconsistencies.

MR. FISH: I offer its admission on the part of the defendant, your Honor.

THE COURT: Pardon me?

MR. FISH: I offer this as an admission of the defendant. This is made by the general superintendent.

THE COURT: Well, you want the whole statement in as an admission?

MR. FISH: Yes, your Honor, as an admission.

THE COURT: What do you say?

MR. GEEN: May I be heard on this, your Honor?

THE COURT: Yes.

MR. GEEN: I respectfully suggest to your Honor, I have not read the statement, this is an attempt to get into evidence a prior consistent statement which I say is inadmissible. If there is an admission contained in there other than this witness', that he has already testified to, then I would say it had some materiality. But if it is merely cumulative, it is an attempt to support this witness' capability with a prior consistent statement, and that I say should not be permitted.

THE COURT: Well, yes, I think if he has made an admission in there which is somehow inconsistent with his statement here again you would get that in as a prior inconsistent statement, or an admission. But what are you pointing out in that statement which is different from his testimony? The reason the witness is here is so that you can bring out anything, and if he has made some inconsistent statement, you get it in on that ground as an admission. What is it that you want us to see in that statement?

MR. FISH: Well, this is the general story of the casualty as stated by the witness at the time his recollection was fresh. That was furnished as a statement of what occurred by the defendant to us. That is the admission of the defendant's. I believe this statement was made prior to the institution of litigation, your Honor.

THE COURT: Well, you want it in for what purpose?

MR. FISH: As an admission of the defendant of my case against him.

THE COURT: Is there something in there which is different from what the witness has testified to?

MR. FISH: In general, I think this is in accordance with my understanding of the witness' testimony. It may be that there will be a question as to what the witness has testified or meant. I think this is pretty clear.

THE COURT: I don't understand your purpose in getting it in or even wanting it in. The man is here to testify and he has testified. If he has some statement in there which is inconsistent with his testimony, then I can see your wanting it in there. But if it is not, what is the purpose?

MR. FISH: I think this is valuable as a statement made at the time rather than four or five years later. He said that his memory is inaccurate this morning. He said he doesn't remember things.

THE COURT: Well, again, you could get that in as past recollection recorded, but it has to be more specific. If he says I don't recall a particular item and he has written it out, you can get it in as past recollection recorded.

Now, do you have something specific in there that he has not recalled today and cannot recall? Even after you have refreshed his recollection with it?

MR. FISH: I think it is not inconsistent, your Honor.

THE COURT: Well then, it has no purpose. Let us proceed.

MR. FISH: That's all I have.

THE COURT: Thank you, you may come down.

[Witness excused.]

THE COURT: Is there another witness for the defendant Kiewit?

MR. LYSAGHT: Yes, your Honor. Could I be excused for about two minutes?

THE COURT: All right, gentlemen. We will just wait here for two minutes.

MR. LYSAGHT: Well, we are approaching the lunch hour, and I think I can --

THE COURT: Do you want to recess for lunch now? Is that what you're saying?

MR. LYSAGHT: Would that be all right with your Honor?

THE COURT: All right, we will recess until 1:45 for lunch.

[Luncheon recess.]

[Time noted: 12:25 p.m.]

AFTERNOON SESSION

[2:10 p.m.]

[In open court.]

THE COURT: Call your next witness.

MR. LYSAGHT: I call Mr. Freelund.

AVRUM FREELUND, called as a witness in behalf of defendant Kiewit, having been previously duly sworn by the Clerk of the Court, testified as follows:

MR. LYSAGHT: With your Honor's permission.

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. LYSAGHT:

Q Mr. Freelund, you testified yesterday on behalf of Raymond International; is that correct, sir?

A Yes.

MR. LYSAGHT: I beg your pardon.

MR. FISH: Excuse me. I believe Mr. Freelund has been recalled as Mr. Lysaght's witness rather than for further cross-examination; is that correct?

MR. LYSAGHT: That is what I was about to bring out.

THE COURT: Just a minute. He was called yesterday by whom?

MR. FISH: By me.

THE COURT: I see. He is now being called as your witness; is that it?

MR. LYSAGHT: Yes, your Honor.

THE COURT: All right.

BY MR. LYSAGHT:

Q And I asked you to come back today; is that correct, sir?

A Yes.

Q Have you been here present in court throughout the entire trial?

A Yes, I have.

Q Have you heard all the testimony?

A Yes, I have.

Q Have you heard the description of the accident given by Mr. Whelan and by Mr. Comer?

A Yes.

Q I believe you stated, sir, that you took a degree from MIT, Massachusetts Institute of Technology?

A Yes.

Q In naval architecture?

A Naval architecture and marine engineering.

Q Then thereafter you had some seagoing experience for a few years as an officer of the Navy?

A Yes.

Q And your entire career has been in this line?

A Yes.

Q You are familiar with the construction of the Century?

A Intimately.

Q Did you participate in its construction?

A Yes.

Q Are you familiar with the lifting capacities of the Century?

A Yes.

MR. LYSAGHT: Your Honor, with your Honor's permission, and I will accept your Honor's directive, rather than go through a lengthy hypothetical question, may I ask his opinion?

THE COURT: As to what?

MR. LYSAGHT: As to whether or not he has anything as to what caused the lifting loop to fail.

THE COURT: All right, since he has heard all the testimony, and you will ask him to assume certain facts, but you would probably have to put the facts to him that you want him to assume so the record is clear what he is answering.

Q I want you to assume, Mr. Freelund, that all the facts that you heard were true, to wit, that the derrick Century, the barge Century, was positioned parallel with the scow, and that it had successfully raised and placed approximately 200, 300 beams before the date of this casualty;

that the derrick, barge Century had a lifting capacity of around four, five hundred tons with ballast, and I want you to assume that ballast constitutes water placed in the port side of the barge to counter balance excessive weights which are being lifted by the derrick;

that on the date of this accident this particular barge was raising 130 ton "T" girders and that these "T" girders had embedded in them steel cables, or lifting hooks which had a safety factor, I want you to assume that, of 3.5;

that on the morning of this particular incident the derrick, barge Century had no ballast and that the scow on which the girders were placed was position approximately forty feet off the line of the barge, Century;

that the boom was position over the scow with the fall lines plumb, or vertical, and that the lifting devices which attached to the lifting boom were secured to the eyes of the various lifting loops which were embedded into the concrete "T" girder;

that before the lift, before this particular lift, two "T" girders had been lifted and placed successfully;

that at the time of this incident the lifting devices were positioned over and inserted into the eyes of the lifting hooks and there was certain blocking securing the "T" beam in place;

that the slack was taken up on the line and that the blocking was knocked out, or freed, and that under ordinary circumstances when the barge Century was actually lifting 130 ton girders it would list to the extent that the upper portion, or I believe the gunwhale, would be just about even with, or two or three inches below the water line;

that at the time this lift occurred, the blocking was freed and a signal was given to raise this particular "T" girder;

that as the girder was just about to be lifted, and when the one gunwhale, or edge of the barge Century was about six inches above the water, one of the lifting loops snapped and that thereafter the other lifting loops snapped causing the lifting beam to swing free and strike the Century.

Based upon an assumption of those facts, and based upon your experience, do you have an opinion with a reasonable degree of marine engineering certainty as to what caused the lifting loop or loops to break?

A First I would like to --

MR. GEEN: Before the witness answers the question, your Honor, has it been established that this witness is a licensed professional engineer?

MR. LYSAGHT: May we ask him that question, your Honor?

THE COURT: Yes, ask him that.

A No, I'm not a licensed professional engineer.

MR. LYSAGHT: I don't see how that matters, your Honor.

MR. GEEN: Your Honor, yesterday the witness as a salvage expert as to the need and the cost for repairing damage to a ship. He is now being asked questions along an entirely different line, and I submit that I do not think his qualifications have been established in this area.

THE COURT: What qualifications do you have in mind are necessary to answer this question?

MR. GEEN: I think this falls within the realm of professional engineering.

THE COURT: What do you say to that, Mr. Lysaght?

MR. LYSAGHT: I would say the mere designation of an engineer does not constitute a necessary background to answer a question like that. This witness has testified that he is a graduate of MIT, he specialized in naval architecture, studied various engineering courses, went to sea and was not only familiar with derricks and barges, but participated in the actual construction from the beginning of this particular barge, Century. If he is not a professional engineer it might go to the weight of his testimony, your Honor, but I don't think it would go to the admissibility.

THE COURT: Well, you are putting a question to him as an expert, and the question is whether he qualified as an expert in that area, that is to tell us what would have caused or might cause this accident, and I gather the objection is that only a licensed engineer is qualified to answer that question.

MR. LYSAGHT: Yes, your Honor. Now I would respectfully submit that whereas that might go to the weight of the testimony, your Honor could take that into consideration in evaluating this gentleman's testimony, but it would not go to its admissibility.

In other words, he could render an opinion.

The opinion would be admissible.

THE COURT: It would have to go to admissibility. We couldn't call a farmer up here and put that question to him, could we? The question is whether he is qualified to even answer it. Therefore, it would have to go to the admissibility and not the weight.

MR. LYSAGHT: May I then lay a foundation, your Honor?

THE COURT: Yes.

BY MR. LYSAGHT:

Q Sir, are you a graduate engineer?

A Yes, I am.

Q From Massachusetts Institute of Technology?

A Yes.

Q And to begin to be a professional engineer, what did you have to do?

A It requires a certain amount of experience and the passing of an examination administered by the State.

Q When did you obtain your degree in engineering?

A In 1955.

Q While in MIT what courses did you study?

A Well, the first year was basic background which all engineering students studied there. It went into physics, chemistry, mathematics, as well the subjects in humanities.

From the second year through the fourth year there were introduced an increasing number of specialized engineering courses related to naval architecture, stability, strength of materials.

Q When you say stability and strength of materials, what are you referring to, sir?

A Well, stability referring to the naval architectural consideration of stability, what keeps a vessel upright in the water under the various conditions to which a vessel is exposed in service.

Strength of the materials refers to the science and knowledge of engineering materials, their application, their ability to bear loads, the manner in which they resist loads that are applied to them.

Q After your achieving your degree in engineering from MIT, where did you go?

A I entered the Navy Officers' Candidate School.

Q Did you receive a commission?

A Yes, I did.

Q While at the Naval Officers' Candidate School, what did you study?

A It was primarily courses in naval leadership, navigation and naval subjects.

Q Upon achieving your commission what was your experience particularly in connection with the lifting devices and capabilities of derricks, et cetera?

A Well, I attended the Navy School for Ship Salvage, but there was very little instruction there that I can say was really directed to this.

Q Would you tell us your background and experience relative to --

THE COURT: Let me ask you this: Are there engineers who specialize in the amount of stress that certain metals can stand?

THE WITNESS: Yes, there are.

THE COURT: What are they called? Stress engineers?

THE WITNESS: Well, I would call them a strength material specialist.

THE COURT: Are you a strength and material specialist?

THE WITNESS: No, I am not, but I consider myself a specialist in characteristics of derrick barges and this particular derrick barge, and I wonder if I might offer something.

THE COURT: Well, the only relevant question is whether you are qualified to testify as to the stress situations involved. It would be one thing to testify as to its structure as an architect, or even as an engineer in structure, but as to the stress which it might withstand or sustain, it would have to be a separate specialty, wouldn't it?

THE WITNESS: No, not at all. The specialty as to the loads of the derrick can withstand especially there is naval architecture, and if I may offer it, naval architecture in most states not admitted as professional engineers because of the degree of specialization that is involved. That they are not engaged in much of the work that a professional engineer does. And I have dealt with naval architecture firms where one of the naval architects and the principals of the firms are professional engineers.

THE COURT: All right, you may proceed.

MR. LYSAGHT: Thank you, your Honor.

BY MR. LYSAGHT:

Q Will you answer my question, then?

MR. GEEN: I have my same objection, and may I ask certain questions before the question is answered?

THE COURT: All right.

MR. LYSAGHT: Is this a voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. GEEN:

Q Mr. Freelund, there is an area in the profession of engineering of fracture mechanics; isn't that right?

A Yes.

THE COURT: Fraction?

MR. GEEN: Fracture mechanics.

Q Which involves the tensile strength of materials?

A Yes.

Q The plasticity of materials, the ductability of steels and other --

THE COURT: Please answer orally.

THE WITNESS: I'm sorry.

A Yes.

Q And as a matter of fact, there have been tremendous advances in knowledge in those areas since 1955?

A Yes, absolutely.

Q The whole field of lamellar tearing, low notch toughness of recent vintage; is that not so, sir?

A No, not that recent.

Q They didn't even start knowing about it until liberty ships started to fail.

A Well, they started failing long before 1955.

Q Yes. And have you attended courses, received any degree since 1955?

A No, I haven't, and I don't consider myself an expert in fracture mechanics.

Q And your specialty is in admiralty and the lifting capacities and stresses as far as the derrick is concerned.

A I don't recognize the term admiralty as applied to engineering. I am a specialist in the lifting forces of this derrick.

Q But you don't hold yourself out to be a specialist in the pre-stressed concrete, or --

A No, not at all.

Q [continuing] -- or metal or steels or loops or cables?

A Not at all.

MR. LYSAGHT: I'm sorry, apparently there was a misunderstanding. He is not being, nor is his opinion being asked as a specialist in metals. It is as a specialist in derrick engineering.

THE COURT: All right. With that limitation we will let the question be answered.

MR. GEEN: I have to note my objection, your Honor, because we are trying to separate something that he is an expert to and ask him to give his conclusion as to what caused a failure of the material when he is not an expert in the material and when he hasn't been given the facts involved in the material.

I cannot see how he can possibly legitimately give an opinion as to the ultimate cause and effect.

THE COURT: All right, proceed.

A Can you repeat the question?

THE COURT: It was a long hypothetical. He asked you to assume all of those facts to be true and then tell us what in your opinion caused the loops to break.

THE WITNESS: I would want to clarify one of those assumptions. You mentioned the distance of 40 feet from the derrick. That would be the distance from the side of the derrick to the girder that was being lifted. Perpendicular distance.

DIRECT EXAMINATION [continued]

BY MR. LYSAGHT:

Q The side of the --

A The side of the derrick barge to the girder being lifted. With that clarification, yes, I do have an opinion.

Q Could you tell me what that is, or, her Honor, what that is?

A I would conclude that the lifting pad fractured because it was unable to bear the stress that it was designed to bear.

MR. GEEN: I object to the answer, your Honor.

THE COURT: The lifting pad?

THE WITNESS: Yes. Or, the loop. I'm sorry, the loop.

MR. GEEN: I object to the answer and I move to strike it out.

THE COURT: You can cross-examine him on it.

MR. LYSAGHT: May I proceed?

THE COURT: Yes.

Q Now, would you tell us the reason for your opinion, sir?

MR. LYSAGHT: With your Honor's permission, could he use the blackboard if he wishes?

THE COURT: Yes.

A Well, I'll start without it if I may. The opinion is --

Q Speak up so we can all hear you.

A I'm sorry. The opinion is not based on any consideration of what the actual mechanics or the nature of the fracture of the pad would be. It's based on the fact that with all those assumptions given the derrick would have been physically incapable of exerting an uplift on that beam substantially greater than the weight of the beam. And if the uplift and the beam being lifted was no greater, or within ten percent or so greater than the weight of the beam, the load on that pad would have been no more than ten percent, say, greater than the load that pad was designed to withstand.

If under those circumstances that pad fractured, the only conclusion that I can draw is that the pad was unable to sustain the load which it was designed to bear.

Q Now, sir, could you tell us, if you will use the blackboard, her Honor said you may --

A Yes. To look at this, if you take the front view of the derrick barge before she makes a lift [indicating]. This would be the hull, the water out here, the "A" crane, and off to the side here the boom. [indicating].

Now, there is not actually a hook here, but we will show it as a hook just to make it simple, and there is the fall here. [Indicating.]

It is possible to adjust, using the engines of the derrick to adjust this distance here, the distance from the top of the lift to the boom fall and to adjust the main fall that's carrying the load. [Indicating.]

If in this case we had the barge out here carrying the beam, I don't know whether it was in the center or what, but we will say the distance from the beam to here is the 40 feet we are talking about [indicating]. And we have underneath the hook this spreader beam.

Now, when the derrick swings the boom out here to pick up the load because of the weight of the boom , the blocks, the lifting tackle out here and this beam, the derrick takes a list toward the load. A relatively small list, maybe three or four degrees. So that instead of this position [indicating] it would be in a position something like this [indicating].

Q Is that because of the weight of the lifting girder?

A The weight of the lifting beam and the derrick's on boom, you know, the tackle, all the gear that is attached to the end of the boom.

Q Based on your familiarity with the Century, what was the weight of the lifting beam in April 1970?

A I'm sorry, we have two. We have the lifting beam here which to my understanding weighs approximately 50 tons, and the derrick's own boom, the weight of the derrick's own boom was just a shade over 50 tons.

There's about 10 to 12 tons of blocks and other gear hung from the ends of the boom, but these are part of the derrick and don't enter into any estimate of the weight that she can lift.

When this is attached to here, these pads connected up, and this fall, the main lifting fall is shortened by going ahead on it, the derrick starts to lean over even more [indicating.] The first that the derrick develops on here is developed very gradually, that it's not as if you had a land crane, a fixed crane that stays rigid relative to the load it's lifting, the distance in the time between applying the load to it and lifting the load is very short in time and in distance.

But on the derrick it has to heel and take considerable list before she is able to lift a load. As was pointed out by Mr. Whelan, as you go ahead on the load this barge tends to move away from the derrick because the derrick starts to list over and this point moves in this direction which is away from the derrick, so it's necessary in going ahead on the fall to go ahead on the topping lift, the boom fall and shorten it so that the vertical line through the end of the boom stays approximately the same distance from the side of the derrick and holds the load constant.

Now, with no ballast in the derrick the absolute maximum that the derrick is able to lift is at the position where the deck edge just starts to submerge. The deck edge on the high side.

I don't know if you want to go into the naval architectural reasons for this as to why. That is the point. As the derrick, if you go ahead more on the fall and haul the derrick over further, the deck edge starts to submerge and the corner starts to come out on the other side and the lifting force that was exerted by the derrick wouldn't increase any more, it would actually start to decrease, and if you kept on going ahead in this direction you would ultimately reach a point where the derrick would have a list of, say, 30 to 45 degrees, and then capsize.

This is something that obviously the crew desires to avoid.

Q In other words, do I understand this, sir, that with no ballast and lifting 130 tons if you were to exceed that lift greatly it would capsize?

A No, she is physically incapable of exceeding the lift. Without the ballast. Of course here it's not 130 tons, it's 130 tons plus the weight of the spreader beam.

Q Which would be what?

A Approximately 180 tons that the derrick is lifting. The useful load is only the weight of the beam, 130 tons, but this is a necessary appliance in here and the derrick only sees what's, you know, what's below its hook. And as far as the derrick is concerned, she would be lifting 180 tons.

Q So you say it would be physically impossible?

A It would be physically impossible. The stability of the hull would be inadequate to lift substantially more, or significantly more than the weight of the beam plus the girder at this outreach unless ballast were put into the hull.

The 500 ton capacity that was mentioned can be generated at a maximum distance of 20 feet from the side of the derrick only after the boom is physically shifted from the heel of the boom from its position here, [Indicating], to a position some 15 feet here. [Indicating.] An alternate position that takes approximately six to eight hours to make that shift, and then with three ballast tanks on this side of the derrick full of water in order to make that lift filling the ballast tanks alone takes considerably over an hour to do.

She can work with no ballast tanks full, one, two, three or four ballast tanks full, and under each of those conditions its behavior is different and it's in a certain sense a different vessel.

Q Can the captain or the engineer operating the derrick tell based upon your experience whether or not he is exceeding the load expected when he is making the lift?

A Absolutely. They have had experience in operating not only other derricks but this particular derrick, and almost every load that we handled is known, the weight is known fairly accurately. And over long experience of handling these loads they know the configuration, the way the derrick behaves as each load is lifted. A given weight at a given distance.

We have had instances occur in the past with the derricks where, well, I can think of one example where a transformer -- no, I have a better one, there was a deck house section that was being lifted in Todd Shipyards, a fairly large, bulky pre-fabricated section of a ship. We were given an estimated weight for this, which I believe was in the neighborhood of 250 tons. We knew the outreach, and this was done with the Century, the Century went over there, hooked onto the load and went ahead and reached the point where the captain of the derrick, the mate of the derrick, our superintendent all felt that the derrick was pulling a load equal to what the weight of the piece was given to us has, and it didn't come up. It didn't appear to be even getting light.

Well, we continued to go ahead, and at a load approximately 20% greater than the load that we were given, the piece was lifted and, you know, the job was completed successfully. But since we are paid by the weight of the piece that we lift, we took it up with the shipyard who was the customer and said, we think they declared the weight wrong, and we said, you said it was so many tons, and we estimated at their weight. They went back, doublechecked their weight estimate and found that they had left a number of components out and the actual weight we lifted was within a few tons of the weight the crew estimated it was.

Q Would you lighten this derrick barge in the water to like a scale as far as estimating --

A Yes, that's an excellent analogy. It's like a spring balance. But if you pick something up with a spring balance you lift the top of the balance up, the spring has to extend until it reaches a certain point that is equal to the weight at which point the load will leave the floor.

Q Mr. Freelund, did you hear the testimony, or the claim that blocking was not released before this beam was raised?

A Yes, I did.

Q Did you hear the testimony that the hooks, or the cables, the lifting devices were in the girder that was being raised, had a safety factor of 3.5?

A Yes.

Q If I multiplied 130 tons by 3.5 I would get about 455 tons?

A About that, yes.

Q I want you to assume, sir, that they failed to remove the blocking; right? And that these straps broke because of the failure to remove the blocking;

Do you have an opinion with a reasonable degree of engineering certainty as to whether or not my assumption is correct?

A Well, this --

THE COURT: What assumption?

MR. LYSAGHT: That it was the failure to release the blocking that caused the straps to break.

A Well, your assumption then is that the derrick was able to exert an uplift in that beam of over, well over 400 tons. That in order to exceed the nominal breaking strength times the safe workload. It would be utterly impossible for the derrick to exert a load even approaching that.

Q Would you tell her Honor and myself why? Would you tell us why?

A Because without ballast in there the stability of the hull was just absolutely inadequate to develop that force. You mentioned the analogy before of the row boat. If you stand on one edge of a row boat it may bring the side of the gunwhale of the row boat next to the water, but if your friend goes over with you, it's going to flip over because it can't stand, it can't resist the overturning motion from that weight at that distance, and it is identically the same situation you have here.

Q I see. Sir, directing your attention to these lifting loops that were embedded into the concrete, what would you call them?

A Well, I would tend to call them a lifting pad.

Q A lifting what, sir?

A A lifting pad.

Q Or pre-stressed strands?

A Oh, material, yes it is pre-stressed strands.

Q I show you Defendant Bayshore Exhibit No. XXII in evidence --

MR. GEEN: Roman numeral.

Q Roman numeral XXII. [Handing.] I ask you to examine it.

A Yes.

Q Are those pre-stressed wires? Or what would you call them, let me put it that way.

A They look like the pads that were installed on the beams.

Q Did you study metals in college?

A I did, yes.

Q Did you study wires, and have you handled them in connection with your profession?

A Well, since graduating, because wire rope is such an important component to derrick barges, I have done a considerable study and research into steel wire rope.

Q Now sir, within each coil about how many wires are there?

A There are seven.

Q Are each of these seven wires designed to carry their own share of the load?

A Well, again, looking at this as my knowledge of wire rope rather than pre-stressing strands, because I'm not familiar with pre-stressing strand, a piece of wire rope, yes, each individual wire is designed to carry its own share of the load.

Q If one of the wires snapps, is that transmitted to the others?

A Well, it depends on the total number of wires in the rope. What you have here is a relatively small number of wires, if one of them snaps, then it's a greater percentage of the total load bearing capacity that is eliminated. If you have a wire that has 25 strands in it, instead of 7 and one of them snaps, then you have only lost 1/25 of the strength of the wire, or the rope, and here if one of these wires snap, you have got in each of these individual ones you lose 1/7 of the total, that would take away one 1/21 part of it.

Q Is there a process in the manufacture of steel wires whereby you increase the strength of the wire by pulling on it?

A Well, the basic method of manufacturing high strength steel wire calls for drawing it, using a reduction in the area of the wire by drawing it through a die.

Q Drawing it through a die?

A Yes.

Q And as you increase the strength by drawing it through a die, what do you do with the ductility or plasticity of that?

MR. GEEN: YOur Honor, I thought the witness had professed that he was not an expert in this area.

THE WITNESS: I can talk about wire in general, wires used in wire rope.

Yes, as opposed to pre-stressed.

Q Are these principles applicable generally?

A Yes, and my study hasn't been a formalized study, but it's been a number of hours going over material on it, indicates that one piece of steel wire referring to these individual wires in here is very much the same as another piece of steel wire. That in the process of manufacturing the wire they start with a hot rolled rod and progressively draw it through smaller and smaller dies in order to increase its strength and reduce its size.

The maximum strength that can be obtained by doing this is dependent on the chemical makeup of the wire, primarily the carbon content and the percentage of reduction that is obtained, the ratio of the final -- but when you draw a wire to get maximum strength you lose certain other characteristics of the wire.

Q What do you lose?

A It would be ductility, it would be impact resistance that you would lose and the wire becomes harder and in a sense more brittle.

Q In other words, in layman's words it becomes more brittle?

A Yes.

Q What is a discontinuity in a wire?

A Well, it would be anything that would render the wire in a given area homogeneous and not uniform as you travel along the section of the wire.

Q What is a bend or a knick in the wire?

A Well, either in the process of manufacture or coiling or handling, any physical damage to the wire that would result in a particular point of its cross section not being a perfect circle would be a knick. I guess it's an ordinary knick. If something hard and sharp were to strike the wire,it would cause a knick, a roughness you could feel with your finger. If it were bent, somehow the wire wouldn't be straight.

Q Can a bend or a knick cause the wire to weaken?

A Yes, very definitely.

Q What is a kink or a twist in a wire?

A Well, a kink would result from the -- you have to distinguish between the individual wires and the total strand. In either case if you have this whole strand which is pretty stiff, if it were mishandled in any way you could get it to take a permanent set.

In other words, if you had a coil, took a coil in the wire, a turn in the wire and pulled it out without freeing it properly, the wire wouldn't just straighten out, it would take a bend in the set in there and develop a kink.

Q After these pre-stressed cables are manufactured and before they are inserted into the concrete for ultimate use, can kinks, bends, twists or knicks arise in the handling or the maintenance or the storage of the wires?

A Well, it's like any other material. Of course it could.

Q Can defects occur in the manufacturing process? I am speaking about the insertion of non-homogeneous material.

A Yes. It could --

MR. GEEN: I have not objected before, your Honor, but there is absolutely no testimony in the record to date of any of this subject matter which Mr. Lysaght is inquiring into. This is all academic. The questions are being asked academically. I don't see its probative value.

Is Mr. Lysaght saying that he is subsequently going to connect this hypothetical question with some evidence?

MR. LYSAGHT: Your Honor, may I reply to that now?

THE COURT: Yes.

MR. LYSAGHT: As I pointed out, your Honor, in my memorandum, the sudden unexplained breaking of an object is sufficient evidence of negligence, and I am going to various reasons why materials might contain defects. I am laying a foundation in the event they come back with attempted contradictory evidence.

THE COURT: All right.

A You asked about non --

MR. GEEN: May I have a ruling on my objection, your Honor?

THE COURT: Yes. He is calling the witness as an expert to tell us what might cause these wires to break.

MR. GEEN: I don't believe that is proper, your Honor. Not what might cause it to break. We are only interested here in what caused it to break, or some evidence that would lead to a professional opinion with a reasonable degree of engineering certainty of what caused it to break. Not all the possible things in the world that might cause some wire under some circumstances to break.

THE COURT: Overruled.

A The non-homogenity in the material could be as a result of non-uniform carbon content and the rod from which the wire was drawn so the chemical composition would not be identical from one end to the other.

It can result in the point at which the two pieces of wire were welded together end to end in the drawing process, because they can work with infinite length of wire.

It could result from a possible slag being included in the wire, being embedded in there and being drawn through the --

THE COURT: You have previously said that you were not an expert in pre-stress. Is what you are saying now applicable to pre-stress as opposed to regular wire?

THE WITNESS: It's applicable to any drawn steel wire, yes, your Honor.

THE COURT: All right.

MR. LYSAGHT: No further questions, your Honor.

MR. FISH: No questions, your Honor.

MR. GEEN: May I have three or four minutes to check, your Honor? I want to speak to a man in the courtroom before cross-examination.

THE COURT: All right, we will take a brief recess.

[Short recess.]

THE COURT: Proceed.

CROSS-EXAMINATION

BY MR. GEEN:

Q Mr. Freelund, I believe you told us that the load on the derrick as reflected by the list of the barge, there were some variables, and is one of those variables the distance of the barge from the scow?

A Not the barge from the scow. The side of the barge to the center of the load being lifted.

Q All right. Well, that could vary on the location of the scow itself, could it not?

A Yes.

Q And as I understand it, you do not know which particular girder was being located on this scow that was being lifted; is that correct?

A I was told it was 40 feet from the side of the derrick.

Q Forty feet?

A From the side of the derrick to the center.

Q And you assume 40 feet in answser to the hypothetical; is that correct?

A Yes.

Q Was there a rectangular hull to the Century?

A It's a conventional barge shaped hull, it's a rectangular cross sectional midship with a rake at each end.

Q What was the depth of the hull?

A Eighteen feet.

Q 160 feet long and 60 feet wide?

A 165 feet long and 66 feet wide.

Q By the way, you spoke about inclusions in metal, you spoke about discontinuities. Are you speaking about micro discontinuities?

A I said any sort of discontinuities.

Q When steel is fabricated at a plant it's fabricated in heats, they refer to them as heats; is that correct?

A I believe so, yes.

Q And with a kind of ladle after so many heats part of the molten metal is removed and it is given chemical analysis; is that correct?

A Yes.

Q And the mill provides a certificate, a mill certificate on --

A Yes.

Q [continuing] -- to the purchaser?

A Yes.

Q And that mill certificate contains a chemical analysis and chemical structure of the particular steel that is being purchased?

A Yes.

Q Have you ever requested or seen the mill certificate in regard to the steel that was used to make up the lifting loops?

A No, not those lifting loops at all. No.

Q As a matter of fact, once it is fabricated and bought from the manufacturer, it's only through destructive testing by a metallurgist that you would be able to determine the exact chemical contents of the metal; isn't that so?

A It wouldn't take a destructive test to determine chemical content. It would take a test of a sample of the material.

Q Well, it would certainly --

A And you could obtain the sample without destroying the whole lot of material.

Q Oh, I didn't mean the whole lot of material. I mean that you certainly are destroying the material that you are examining.

A Well, you are destroying a very small piece of material. A destructive test is usually a physical test, you know, where you pull a piece of wire to destruction. Where there is a considerably larger piece of material that is destroyed.

Q And if you want to test its notch toughness you put a notch in it and then it's used to see what stress will take to break it.

A Yes.

Q And you are breaking two pieces.

A Yes.

Q That is what I meant by destructive.

A Yes.

Q All right. By the way, you are not a metallurgist, are you?

A No, I'm not.

Q These separate strands of cable, what is the diameter of those three strands?

THE COURT: Combined?

MR. GEEN: No, separately. Each one.

A Each of those strands looks to be about 3/8 of an inch in diameter.

Q If I told you that one was 1/2 inch in diameter and the others were 7/16, would you accept that?

A Yes, I would.

Q Taking the 1/2 inch strand alone, what is the weight bearing capacity of that 1/2 inch strand?

A I have no idea.

Q What is the weight bearing capacity of the 7/16 inch strand?

A I have no idea.

Q What is the weight bearing capacity of those three strands combined?

A I have no idea.

Q If you have a half inch strand and three 7/16 inch strands how will the weight bearing capacity be affected if one of the 7/16 inch strands breaks?

A You mean if each of these seven wires in the total 7/16 strand breaks?

Q Yes. What is the effect on the load bearing capacity of the other strand which is 1/2 inch and another strand which is 7/16 inch?

A Well, it doesn't affect the capacity of them to bear a load. It affects the load that they would have to be called upon to carry.

Q That is what I am asking you. What loads could it carry with the three strands and what loads could it carry with two strands?

A Well, I would have to know the load bearing capacities of the individual strands to be able to calculate that. It would be, in very rough numbers, if one of the 7/16 strands broke, it would be a little better than 2/3 the total load bearing capacity left.

Q If a steel is brittle and doesn't have plasticity, doesn't have ductability, a metallurgist can find that by performing tests?

A Yes.

Q Do you know what necking at a fracture site means?

A Yes, indeed.

Q Could you tell the Court what necking at a fracture site means?

A May I draw it?

THE COURT: No, you could tell me.

A Okay. If you take a piece of steel and put it in straight tension extending it until it fails in tension, the area where it is going to fail starts to become smaller in diameter. It reduces down and forms a neck and the final failure will occur at the smallest diameter.

Q Would it be fair to say like a piece of taffy being pulled apart, it starts getting narrower and narrower in the center until it ultimately breaks?

THE COURT: Please don't repeat the testimony of the witness, Mr. Lysaght has a tendency to do that also. We understood it.

MR. LYSAGHT: I apologize for doing that, your Honor.

THE WITNESS: Well, it wouldn't be quite like a piece of taffy because the taffy if you put it -

THE COURT: No, you don't have to answer that. You have already explained . There is no point in his giving a less simple example.

Q A piece of cable that has failed after necking down means that it had plasticity and it was expanding and finally ultimately failed because it was put to a stress in excess of its capacity.

A I don't see what you are driving at.

Q Didn't you understand my question?

THE COURT: Repeat the question.

[Question read.]

THE COURT: I don't understand the question.

BY MR. GEEN:

Q When you have a brittle fracture you are not going to have much necking if any down on the metal.

A Right.

Q Because it's brittle, it won't expand, it has no ductability, it has little, we are talking in relative terms.

A Yes.

Q But when you find by the fracture that it has, the metal near the fracture has necked down, has thinned out before it fractures, that shows you that it did expand, it had plasticity and it's a stress failure as distinguished from a brittle failure.

A It's a ductile failure as compared to a brittle failure.

Q And a ductile failure is also called a stress failure; is that right?

A Yes.

Q And if you determine the strength and the load bearing capacity of that metal and you find that there has been a stress failure, then you know that it was put to a stress in excess of its capacity. That's a pretty simple statement, but true, isn't it?

A If you examine a piece of metal that failed you can tell by examining if there was necking there, yes, it's a stress or a ductile failure.

Q Is it correct to say that you don't know of any inclusions in the metal of the, you called them pads, concrete pads, that failed?

A No.

Q You don't know of any kinks?

A No.

Q YOu don't know the carbon content?

A No.

Q You don't know the weight bearing capacity ?

A No.

Q Did you go onto the scow after this occurred?

A I may have stepped across it. My concern when I arrived at the site was with the derrick, not the scow.

Q Did you have an opportunity to look at the broken pads?

A I'm sure I had an opportunity to, but I don't have any memory of having looked at them. I didn't make any attempt to examine them, if that's what you're driving at.

Q You didn't examine them to see if there was a necking down of the --

A No.

MR. GEEN: I have no further questions,your HOnor.

MR. LYSAGHT: Just one or two on redirect examination, your Honor.

REDIRECT EXAMINATION

BY MR. LYSAGHT:

Q Sir, in the manufacture of the wire if you have the insertion of a non-homogeneous material, can that give it less tensile strength than it should ordinarily have?

A It would be a different tensile strength. It could be either greater or smaller.

Q And assuming that it was smaller than that expected and that a stress were put on it and it snapped at a load which it ordinarily should carry, would you have a necking down?

A I would imagine it would depend on the nature of the non-homogenity.

Q I see. Could you think of any non-homogeneous type materials that would be inserted that would cause a necking down?

A Well, if it were a local reduction in the carbon content of the wire, the wire would have a, over a short length of where the tensile strength of the wire wouldn't be as great as the surrounding wire --

Q And it would --

A There would be a chemical non-homogenity.

Q And it would snap?

A Yes.

Q And you would have a necking down?

A Yes.

MR. LYSAGHT: Thank you, your Honor.

MR. GEEN: Your Honor, I excluded a question which I wanted to ask. It really is not part of Mr. Lysaght's redirect examination. I would have to ask the Court, because I should have asked --

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. GEEN:

Q Mr. Freelund, by using a pin either three or four inches in diameter and placing that under the top of the lifting pad, you are putting your stress at this point at the top of the apex and at the places where they are embedded into the concrete; isn't that correct?

A Yes. You place the stress on the whole piece of wire.

Q Yes, but that's the place where your three highest points of stress are?

A I wouldn't say that. I would say that if you put that top over a three-inch pin you will have a single highest point of stress there.

Q Where?

A At the three-inch pin. But there was testimony that there was something else there, so --

Q That was the bearing?

A Mr. Comer testified there was a spacer, or a washer in there that was used to fill out the --

Q And it was resting on that spacer.

A Yes.

Q What was the diameter of the spacer?

A I think he mentioned a figure of six inches, but I'm not certain.

Q Would there be a different distribution of stress if you used a circular -- if when the pad was being lifted it was being lifted by an object that encompassed a large portion of the arc, would there be different stress factors involved?

A Than if it were done on a small job?

Q Yes.

A Yes, certainly.

Q Would there be a different effect if your equalizer was right at the base of the pad as distinguished from way up on top of the lifting leg?

A If the equalizer were properly designed, there would be no difference.

Q Would you agree, sir, that your equalizer being right at the lifting pad would be an equalizer that would make finer adjustments than one that was at the top of the leg?

A Not at all. It would depend on the design of the equalizer. One could be designed equally to fit either location.

Q It would depend upon the design of the equalizer?

A Yes.

MR. GEEN: I have no further questions, your Honor.

THE COURT: All right. Thank you. You may come down.

Next witness.

[Witness excused.]

MR. LYSAGHT: I would like to call Mr. Ratner.

JERROLD RATNER, called as a witness in behalf of defendant Kiewit, being first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. LYSAGHT:

Q Mr. Ratner, by whom are you presently employed?

A DeLeuw Cather, Inc., New York.

Q What type of firm is that?

A Engineering outfit.

Q How long have you been associated with that firm?

A One year.

Q Where were you associated before that?

A Just prior to this employment, Donald Hearney.

Q At some time were you associated with Kiewit-Slattery?

A Yes, sir.

Q What years were you employed by Kiewit-Slattery?

A I was employed four and a half years with them, from '68, February, I believe, '72.

Q Were you employed by them at the time of this casualty?

A Yes, sir.

Q What was your occupation at that time?

A Engineer.

Q What did your duties consist of?

A Cross Bay Bridge, consisted of purchasing of materials, coordination between the sub-contractors and the contractors, material and supply men, and coordination between the field and the office.

Q In conjunction with your background and experience, sir, have you had experience relative to the reasonable value of work labor and services rendered in the field?

A Worked fifteen years in construction.

THE COURT: Keep your voice up, please.

A Fifteen years in construction.

Q And you have had experience in reasonable value and knowledge of prices, et cetera. Now, at the time this accident occurred, where were you?

A I was in the office.

Q Where was the office situated with reference to this particular site?

A It was approximately adjacent to the site.

Q When you say "adjacent to the site", was it on land?

A It was on land adjacent to the bulkhead.

Q How far out further into the water was the barge Century and the scow?

A Fifteen hundred feet.

Q After you learned of the incident, what did you do?

A About a couple of hours later I went out to look at the barge to see if there was any damage, or any damage to the beam.

Q Did you go on the scow to do that?

A Yes, sir.

Q Did you see the beam that failed?

A Yes, sir.

Q Did you see whether there was any blocking or tying down about it at that time?

A There was no blocking on it, sir.

THE COURT: I didn't get that. Would you read the last question and answer?

[Question and answer read.]

THE COURT: What is blocking, or tying down? Would you explain what we mean by that, Mr. Ratner?

THE WITNESS: That is the blocking between the uprights as Mr. Comer made a picture of, and those blocks.

THE COURT: I see. You are speaking of the beam itself. All right, I had just lost track.

Q Is part of the tie down shown on Bayshore's Roman numeral Exhibits XVII and XVI in evidence? [Handing.]

A . This is the blocking. [Indicating.]

Q Was there any such blocking holding down the beam in question at the time you arrived on the scow?

A No.

THE COURT: When did you arrive on the scow?

THE WITNESS: I would say approximately a couple of hours after the incident.

Q Now, sir, how long did you remain on the scow?

A Approximately an hour.

Q Where did you go then?

A Back to the office.

Q Was this particular beam left on the scow overnight?

A Yes, sir.

Q Was it the practice in your firm to tie down anything on a ship that remained overnight?

MR. GEEN: That is objected to.

THE COURT: Pardon me? What is the objection?

MR. GEEN: What the practice of his firm was. We are talking now about a specific situation, your Honor.

THE COURT: All right. He can ask him the practice, he can ask him if it was done on this occasion.

Q Would you put down the exhibits and answer my question?

A Your question, if I recall, was what was the practice?

THE COURT: Yes, what was the practice.

Q Yes.

A If it was left overnight?

Q Yes.

A To secure it. To tie it down.

Q Do you secure it or tie it down with blocking of the type exhibited?

A Yes.

Q With reference to transporting the scow to a pier, what was the practice of your firm with reference to tying down beams?

A To have the beam -- to have it secured in case you came in hard to the dock you didn't knock it over.

Q If the scow were out there in the water at night, is there a danger that other boats coming by might create waves?

A Yes, sir.

MR. GEEN: Your Honor, I object to this line of questioning. I mean, if the witness has any personal knowledge of what was done on this scow --

THE COURT: Yes. You have to tie it to this incident.

Q Sir, to your knowledge, were these beams ultimately secured at any time after the accident occurred?

A Excuse me. Can you repeat that?

[Question read.]

A Yes, sir, because the next day when it came inshore there was blocking on the beams.

Q Did you go aboard this scow the next day?

A Yes, sir.

Q Was this scow ultimately towed from the position where it was at the time of the casualty to land, or a pier of some type?

A It was brought into the bulkhead, yes, sir.

Q Do you recall when that was done?

A In the a.m.

Q In the a.m. of what day?

A The following day.

Q Following this accident, or this casualty, did you firm attempt to raise the beams by using lifting hooks similar to the ones which failed? Or did you lift it in a different manner?

A After the accident? We lifted them in a different manner.

Q What manner was used?

A Chipping holes in the flange of the beam, putting the cable through it and picking it up.

Q Did this method entail any additional work, labor or services other than those initially contemplated?

A Yes, sir.

Q Did the cost of this additional work, labor or services exceed the cost of the work originally contracted for?

A It was over the cost.

Q It was over the cost?

A Yes.

Q Have you personal knowledge of additional work that was performed?

A Yes, sir.

Q Did you make a memorandum of that additional work?

A Yes, sir.

Q All right. I show you this memorandum and I ask you, does this constitute the extra work sheet which was drawn up referable to the additional work, labor and services that were performed following this casualty? [Handing.]

A These are the extra work sheets, yes, sir.

Q And are those work sheets in your own handwriting?

A Yes, sir, and they have my signature on them.

MR. LYSAGHT: I will offer them in evidence, your Honor.

THE COURT: Is there any objection? What number is that?

THE WITNESS: "B" like in boy.

MR. LYSAGHT: I believe it is "B", your Honor. May I look? Yes, Exhibit B marked for identification.

THE COURT: All right. Is there any objection?

MR. GEEN: Yes, I object to it, your Honor. I object to it on several grounds.

First of all, it is the witness' own testimony which is the best evidence, not his work sheet, but more important than that I submit, your Honor, that we are talking here about the damage initially to one beam, and what they say or they claim they spent to lift this one beam in another fashion, and that any other costs they are claiming there is a serious question as to its relevancy, and also there certainly should be a separation and a breakdown.

MR. LYSAGHT: Your Honor, may I --

THE COURT: Yes.

MR. LYSAGHT: My position, your Honor, is, and I think the testimony has been borne out by Mr. Comer, that if these large 130 ton beams, the lifting hooks thereon, failed, and they noted defective wiring in other beams which were to be positioned, it would be foolhardy and criminal on their part to attempt to continue to lift them in a manner which proved unsuccessful, and that they not only had a right to, but they were obligated to lift these in a different manner to insure that a similar mishap would not occur.

Because it is not just a matter of dollars and cents, your Honor, it is a matter of the life and security of the people aboard the ship.

THE COURT: Are you answering his objection, which is that some items are to be broken down which are not, if I understood your objection? Your objection is that something ought to be broken down. It is not clear to me. What ought to be broken down?

MR. GEEN: It does relate to the argument that Mr. Lysaght was making. First of all, I was saying that I object to the document generally, that the witness should testify to it. But moreover as evidence will show that there was more than this one beam, girder with the broken straps on this particular barge and other barges that came later.

The extra work which they are claiming is for all these girders, not just the one where this --

THE COURT: Yes, I understand. What about it?

MR. GEEN: Now there has been no testimony as to there being anything wrong, any defect in any of the other girders. The testimony is they lifted two or three hundred of these before. Now, I say that there can be no proper claim for work they selected to do to its other girders by not using the strap, but I am not asking your Honor to make a ruling on that now, but I am saying there certainly should be a breakdown so that we know what they claim they had to spend for this one particular girder where the straps broke.

THE COURT: I see. Do you claim that these additional girders which were later lifted were examined to determine that they might have the same problem? Is there testimony to that effect, or will there be?

MR. LYSAGHT: There was testimony, your Honor, that Mr. Comer dug into one or two of the other beams which remained to be placed. My position is, your Honor, that my client could not take a chance. Answering your question, they did not physically dig down into each beam to see if the wiring was secure, because they are not engineers, but in view of what had occurred, and in view of his digging into the masonry in one or two other beams, they could not rely on the safety of these lifting straps any longer.

THE COURT: So you then proceeded to incur additional expense to lift them in a different manner; is that it?

MR. LYSAGHT: Yes, ma'am.

THE COURT: Do you have it broken down as to what it costs for this particular beam in question as opposed to the remaining beams? Or is it all one document showing everything? Are the beams separately itemized?

MR. LYSAGHT: May I ask the witness that question, your Honor?

THE COURT: All right.

MR. LYSAGHT: Could you answer her Honor's question, Mr. Ratner?

THE WITNESS: No, your Honor, they were not broken down per beam to be chipped.

THE COURT: No, to be lifted in a different manner.

THE WITNESS: To be lifted. They were not broken down into the beams to be lifted in another manner. They were lump sum, if I may -- he might object -- this was as an overall picture because we had lost time and continuity and it would be hard for me at this time to pull it apart.

THE COURT: Well, what does that show?

THE WITNESS: It shows a total cost for the remaining beams for holes to be chopped into them to lift them in a different manner.

THE COURT: How many remaining beams were there?

THE WITNESS: I couldn't tell you at this time exactly.

THE COURT: They are not listed there? Or, it doesn't indicate?

THE WITNESS: All I had put down is the date that the work was done to chip holes in "T" beams.

THE COURT: And that was a record made by you; is that it?

THE WITNESS: Yes, ma'am. Each one was done individually per day.

THE COURT: Was it your job to make such a record for the company? What was your job again with the company?

THE WITNESS: Coordination between the field and the office.

THE COURT: Coordination between what?

THE WITNESS: The field and the office. I mean the fellows who actually do the work on the drawings and the materials, make sure they have what they need.

THE COURT: Was it the regular course of the business to make and keep such records?

THE WITNESS: Yes, and any back charges, because I also have the sub-contractors, material and supply men.

THE COURT: All right, the objection is overruled. It will be admitted.

[Defendant Kiewit Exhibit B received in evidence.]

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BY MR. LYSAGHT:

Q Mr. Ratner, you have numerous entries on those sheets, do you not, sir?

A Yes.

Q Could you summarize them for us?

A The entries on these are for the derrick boat Century, for the tugs, for the manpower, for the barges, shop stewards, et cetera, that we needed.

Q What did that entail? Would you tell us, in other words, why you had to incur that additional charge?

A Once the -- initially, once the lifting loop broke, the men could not do any more work. The derrick Century was shut down due to supposed damage to the boiler. The men had nothing else to do. We had to pay them for standby, for nothing.

Q Are those charges on those sheets?

A These charges are reflected.

Q In addition to those charges, what else do you have?

A The charges for the tug that we used, that we needed, and now he was actually standing by, he didn't have to shuttle men back and forth, he lost time. The equipment that went along with it.

Q In other words, that was standing idle as well?

A All equipment that was standing idle, including the dock builders, the iron workers and the deck hands.

Q Directing your attention to Page 1-1 --

MR. LYSAGHT: May I, your Honor, with the Court's permission, submit that document to your Honor as we are going over it? I have a photostat of it. [Handing.]

THE COURT: Well, are we going through these item by item?

MR. LYSAGHT: I don't want to do that, your Honor. I just want a general summary.

THE COURT: Well, I can look at it and get that, can't I? Or you can give that to me in the argument. The document can speak for itself and you can argue it at the end.

Let's proceed.

BY MR. LYSAGHT:

Q Did you total up all these extra charges, Mr. Ratner?

A Yes, sir.

Q How much did that total? Or, did you make a summary of these sheets?

A Yes, here's a letter, September 9th.

MR. LYSAGHT: With your Honor's permission.

Q Did you, at my request, I notice in the notes, make a computation or a summary of these sheets back in May? And I show you this document. [Handing.]

A Yes, this is my handwriting.

Q Does that refresh your recollection as to the summarization of the various amounts shown on these sheets?

A Yes, sir. This is a summary of all of the extra work orders from 4/28 to 9/1.

Q What did they total?

A Final total with everything, $44,386.22.

MR. GEEN: Excuse me.

MR. LYSAGHT: May we confer, your Honor, for a moment on an objection? Perhaps we can save the Court some time.

THE COURT: Yes.

MR. LYSAGHT: Perhaps we could tell the Court our problem.

THE COURT: All right.

MR. LYSAGHT: At one stage in the proceedings, your Honor, we had submitted to the representatives of Bayshore a breakdown of the items. At that time Mr. Ratner had summarize certain totals. Other bills had not been received, or, the work had not as yet been performed, and he made an estimate at that time, or I think a mere estimate was taken, and then put a 25% charge on that total.

When the final vouchers were received showing the actual charges, they differed from the estimate, therefore, the figures submitted initially to Mr. Geen's representatives varied from the total that he stated.

THE COURT: Well, what about it?. Is there some objection, Mr. Geen?

MR. GEEN: Well, first I wanted, before I objected, I wanted to find out if there was an explanation of why I had been receipt of a substantially different claim. I don't have the --

THE COURT: All right. We understand it now. So you understand why he has different figures.

Let's proceed.

MR. LYSAGHT: May I, your Honor?

THE COURT: Yes.

BY MR. LYSAGHT:

Q Mr. Ratner, that breakdown that you gave, what are the totals of the actual items before you added on a percentage?

A $35,509.78.

Q When you originally drew up your estimate, originally drew up your work sheets or a summarization of your work sheets, did some of those figures include an estimate?

A There were two sheets that included an estimate, yes, sir.

Q When you got the actual bills were they different than that estimate?

A Yes, sir.

Q And the actual bills, are they actually contained in the exhibit that you have before you?

A Yes, sir. They are backed up.

Q And the actual expenditures incurred totalled $35,509.78?

A Yes, sir.

Q And that is a total of all of these papers; is that correct?

A Yes, sir.

Q Did you then add on a percentage to that figure and add it to that figure?

A Yes, sir.

Q What was that percentage based on, sir?

A Small tools, supplies the men need, expendable material that we don't recover, that we don't need, and after that job is done we don't have to use them any more, they are discarded.

Fuel oil, gas, water, permits, shop stewards and maintenance men, engineers. Which are not reflected in here, which are not of union obligations to have the men on the job and be paid.

Q Is there a stated percentage in the trade as to what those amounts would constitute?

A Well, if you are working 100% on extra work orders, you would charge 100% of that man's time. It would be a percentage of the amount of work being done.

Q What did you charge?

A At this point it was 25%.

Q Did you summarize the totals of those sheets and also show the percentage?

A It added up to $35,000, $35,500, added on 25%, and that comes up to $44,000.

Q Was that a fair and reasonable charge for the work that was performed?

A For this work shown here, yes, excluding some of the work that was incurred but never charged.

MR. LYSAGHT: May I, your Honor, at the Court's convenience, perhaps introduce into evidence that summarization sheet that he made?

THE COURT: Yes, all right. Let it be marked. Is there any objection to the summarization?

MR. FISH: No, your Honor.

THE COURT: Let's mark that Exhibit B-A. Defendant Kiewit's Exhibit B-A.

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[Defendant Kiewit's Exhibit B-A received in evidence.]

MR. LYSAGHT: Let the record indicate, your Honor, the two red insertions at the top of the sheet, in red crayon, Mr. Fish inadvertently started to write on the exhibit.

MR. FISH: I beg your pardon, I thought this was a copy for my records, your Honor, and I started to mark it as Exhibit B-A. I am very sorry about that.

THE COURT: The Clerk will take care of that.

MR. LYSAGHT: With your Honor's permission.

BY MR. LYSAGHT:

Q Sir, I show you Defendant Kiewit's Exhibit E and F marked for identification, and I ask you if those snapshots fairly and accurately represent a view of the laborers doing the work to insert the new hauling device after the casualty occurred? [Handing.]

A Yes, sir.

MR. LYSAGHT: I offer them in evidence, your Honor.

THE COURT: Is there any objection?

MR. GEEN: No.

MR. FISH: No objection.

THE COURT: Defendant Kiewit's Exhibits E and F received.

[Defendant Kiewit Exhibits E and F received in evidence.]

MR. LYSAGHT: I have no further questions, your Honor.

MR. FISH: I have no further questions, your Honor.

THE COURT: Is that something you haven't seen before, Mr. Geen?

MR. GEEN: Yes, it is something I have not seen before,your Honor. Since I will be referring to this, may I stand next to the witness, your Honor?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. GEEN:

Q Sir, you testified that some hours after the occurrence where the lifting loops on one of these girders broke you went out to the scow; is that correct?

A That's correct.

Q When you got out there, did you make an examination of that girder?

A The girder and the barge, both.

Q Did you get up on top of the girder and did you examine the broken lifting loops?

A My examination was not for the broken lifting loops, to see if there were any cracks in the beam, damage structurally.

Q Did you examine the lifting loops?

A I looked at them, yes, but not for damage purposes.

Q Were they broken on one side, were they broken on two sides of the same lifting loop?

A The same lifting loop --

Q Yes.

A I don't know, to be honest with you.

Q Where were they broken? At what point?

A They broke off on one side, as I recall it. I don't believe they were broken at two points. At the base.

Q Were all four lifting loops broken or was only one or two broken?

A All four were.

Q Were they all broken in the same place, at the same location on the lifting loop?

A I couldn't tell you.

Q You don't remember?

A Not the lifting loops, no.

Q Did you examine the broken parts of the lifting loops?

A No. I didn't go out to examine the lifting loops and --

Q I didn't ask you that. I just asked you if you did.

A No.

Q You say you looked around to see if there was any blocking?

A To see if there was damage to it, and while looking you can see the whole beam down the whole end.

Q Did you notice any uprights, metal uprights next to the girder?

A The stanchions as that picture shows, yes.

Q Was there anything around those stanchions?

A Around them?

Q Yes.

A Yes.

Q What was around them?

A The blocking that was hanging from them.

Q You say there was blocking hanging down from them?

A It was on the deck there was blocking.

Q How many blockings did you see on the deck?

A I couldn't tell you the amount. I didn't physically count them.

Q Were there chains attached to this blocking?

A I think there was.

Q On all four sides, or all four blocks on both sides?

A I would assume yes.

Q You would assume?

A Yes.

Q Did you see anybody at any time ever replace any blocking?

A Myself personally?

Q Yes, yourself personally.

A No.

Q Were any of the stanchions, were any portion of them bent?

A No.

Q Did you look at that?

A Bent to where it's really out of proportion?

Q Bent. You are an engineer, you know what bent is, don't you?

A Yes, but as the picture shows, that was used steel, it wasn't new steel.

Q Was any of the steel bent?

A On the stanchion.

Q Yes.

A I don't recall if there was anything excessive. I think there was some kinks.

Q I didn't ask you if it was excessive. I asked you if it was bent.

MR. LYSAGHT: Your Honor, I respectfully object. He is arguing with the witness.

MR. GEEN: I am not arguing with the witness, your Honor. I want to know if any of the stanchions or the seats were bent.

A All the steel since it's been used has some bend in it.

Q You were working for Peter Kiewit; is that right?

A Kiewit-Slattery, yes, sir.

Q Did they hire an independent agency to inspect the loading and the girder at Cape Charles?

A No.

Q No?

A For the loading? Yes.

Q To inspect the loading.

A Excuse me, the loading. I'm sorry. There was another part to that question. The loading and --yes, there was.

Q Was that independent company that was hired by the owner U. S. Salvage?

A Yes, sir.

Q Did U. S. Salvage inspect, to your knowledge, all the girders and the loading and the loaded scow and accept it in behalf of Kiewit-Slattery at Cape Charles before that scow left Cape Charles?

A Yes, sir.

Q Was that by a contract that Kiewit-Slattery had with U. S. Salvage?

A I believe we had a contract with them and not a purchase order.

Q Was that a written contract?

A If they had a contract, it would be written, yes, sir.

Q A contract can be oral, sir, but I won't quarrel with you.

Did that contract spell out in writing the duties and obligations of U. S. Salvage as far as accepting these girders prior to shipment from Cape Charles?

MR. LYSAGHT: I would respectfully submit, your Honor, that I am objecting on the ground that this is irrelevant.

THE COURT: What is irrelevant? What happened at Cape Charles?

MR. LYSAGHT: Yes.

THE COURT: What is the relevance, Mr. Geen?

MR. GEEN: Well, there has been certain discussion here, claim of what might have happened after this girder -- if you recall, yesterday we discussed that it was manufactured, your Honor as a matter of fact asked the date of shipment and the date of manufacture which I could not answer. I think it is very relevant that Peter Kiewit-Slattery had by contract their own agent down in Cape Charles and inspected the loading of these scows and accepted the girders on behalf of Kiewit-Slattery.

THE COURT: Well now, there are two things running together there. The loading and to inspect the girders for their meeting certain specifications might be two different things. There may be an agent there to see that the proper number are loaded and that they are securely loaded so they don't move or something like that.

But to say that they went on there and tested those girders for the strength of those lifting devices is something else again. If that is what they did, then bring it out. If not, then it is irrelevant to anything else.

Q Were you ever down in Cape Charles?

A No, sir.

Q Do you know how these girders were loaded onto the barges?

THE WITNESS: No, that's irrelevant.

MR. GEEN: Your Honor, I ask the Court --

THE COURT: Well, how is it relevant? What are you trying to bring out?

MR. GEEN: If the lifting loops were used prior, that's irrelevant? If this girder was lifted by these lifting loops on an occasion prior to the day of this occurrence?

THE COURT: Well, we assume they had to get them on the ship somehow; is that right?

MR. GEEN: That's right.

THE COURT: And they didn't break in Cape Charles. You are suggesting they might have broken at

Cape Charles?

MR. GEEN: I am sorry, I didn't hear what your Honor said.

THE COURT: We assume they had to get them on the scow at Cape Charles. No one disputes that they got them on there. Now, unless you are trying to bring out that they were broken in Cape Charles, I don't see how it is relevant.

MR. GEEN: Well, I think that while it is obvious they had to be loaded in Cape Charles and while I know, and I say this, I know the lifting loops were used, I don't know, I don't have to prove that. Now, there has been some testimony here that if it broke during this lift it is obvious that these lifting pads could not sustain the load of the beam, but if they were lifted more than once down in Cape Charles, if the girder was lifted, the same 130 ton girder, that would have some relevancy, I believe, on what your Honor chooses to find as a matter of fact as to whether they could sustain the load.

THE COURT: The number of times they were lifted?

MR. GEEN: Yes. The fact that certainly it was lifted once before by these lifting cables, by these pads. Maybe I am missing the point, I don't understand.

THE COURT: Well, you tell me what you are trying to bring out from the witness. First of all, were you in Cape Charles when these girders were loaded?

THE WITNESS: No, ma'am.

THE COURT: So that he wouldn't be able to testify in any event as to how they were loaded. There is no dispute that they were loaded. That is not disputed.

MR. GEEN: No, there is no dispute that they were loaded.

THE COURT: And they were loaded by Kiewit; is that it?

MR. GEEN: No, they were loaded by Bayshore.

THE COURT: An agent employed by them?

MR. LYSAGHT: No, by Bayshore, your Honor.

MR. GEEN: They were loaded by Bayshore under the --

THE COURT: The manufacturer was Bayshore; is that it?

MR. GEEN: The manufacturer was Bayshore, they were loaded by Bayshore under, I don't know, the supervision, I think --

MR. FISH: Subject to inspection, shall we say.

MR. GEEN: Under the supervision, inspection of an independent agency.

THE COURT: Employed by Kiewit, I thought you brought out.

MR. GEEN: That's correct. Now, what was he employed to inspect, do you know?

MR. GEEN: I have never seen a copy of the contract. I can only have somebody testify as to what the man did. I have never seen a copy of that contract.

MR. LYSAGHT: I haven't seen it myself, your Honor, but I believe that they were only employed to see that the proper number of girders were placed there, and that they were securely tied down.

THE COURT: Well, as I indicated before, if the agent employed by Kiewit was employed to inspect the girders to determine whether they met certain specifications, including the sufficiency of those loops, then we could bring that out because that is relevant. If they tested it and so forth, it would have some relevance. But this witness wasn't there, so let's not put it to him.

MR. GEEN: I won't.

THE COURT: But let's get on then.

MR. GEEN: I won't. Mr. Lysaght has said he doesn't have a copy of the contract.

MR. LYSAGHT: Yes.

MR. GEEN: And I don't.

MR. FISH: If your Honor please, I suggest that the contract that is in evidence between Kiewit and Bayshore specifies the method and manner of delivery by Bayshore to Kiewit, and it is conceded that in this case they were accepted under that contract, so I should think that that was the controlling feature here.

MR. LYSAGHT: That's right, your Honor. That was the point I was trying to make. In other words, the contract vis-a-vis Bayshore and my client is the controlling feature.

THE COURT: Well, what does it say, if anything?

MR. LYSAGHT: Mr. Fish, do you have it there?

MR. FISH: I have a copy of the contract here, yes. On page, I believe it is Page 3 of this contract, it provides that beams shall be transported on flat deck scows, contractor will provide any necessary scow reinforcement and dunnage -- all liability of the seller, that would be Bayshore, for handling and transportation terminates on the removal of the scow from the seller's dock or on approval of the loading and securing for shipment by the contractor or his representative.

THE COURT: Well, all that relates to securing the girders on the scow; isn't that right?

MR. LYSAGHT: That's right.

MR. FISH: Yes, your Honor.

THE COURT: All right. Mr. Geen, where are we going now?

MR. GEEN: Where are we going now?

THE COURT: Yes. We have clarified, the contract as between Kiewit and Bayshore related only to the loading of these girders.

MR. GEEN: Are you saying that the contract between Kiewit and U. S. Salvage related only to the loading?

MR. FISH: We don't know.

MR. GEEN: We don't know.

MR. LYSAGHT: Your Honor, I think that question is unfair. Mr. Geen has a habit of bring in irrelevancies and positioning them as points of evidence.

MR. GEEN: Well, your Honor asked me that the contract between Kiewit and Bayshore related only to the loading. Of course it --

THE COURT: That's right. That's the only contract in evidence here, isn't it?

MR. GEEN: That also includes the manufacturer of these girders, your Honor. Bayshore manufactured these.

THE COURT: Yes. Well, where are we going? You are asking this witness what about the --

MR. GEEN: I'm not. But we did go into the fact there was an independent agency hired by contractor, by Peter Kiewit, which was down in Cape Charles. The duties of U. S. Salvage under that contract I do not know because I have never seen that contract and Mr. Lysaght said he hasn't seen it either. And I determined that the witness doesn't know. And that's where we left it off.

THE COURT: All right. Let's proceed from there then.

BY MR. GEEN:

Q Sir, do you know how many barges of girders came up from Cape Charles after the barge in question?

A I am guessing at this point, because I have no record in front of me, but I think it was three or better.

Q Three or better?

A Yes.

Q Did they all contain five girders each?

A I don't know if the last one we brought to service was four or five.

Q Either four or five?

A Yes.

Q Let me ask you, on one of your work sheets here do you know the number of the girder where we had the failure of the pad, the lifting pad? It's been agreed that it's T-205. Would that refresh your recollection? Would that seem right? Because I am going to refer you to other girder numbers that you have on your own work sheets, sir.

Take this work sheet, for example. It talks about the work performed on T beams, T girders --

MR. LYSAGHT: Can we find out what page he is referring to, your Honor?

MR. GEEN: Do you want the number of the page?

MR. LYSAGHT: Yes.

MR. GEEN: 5L.

Q It refers to beams 180, 181, 182, 183, the barge --

A Diamond 90.

Q And all this work was for girders and all these charges were for girders that were delivered on a different barge than the one in question; isn't that correct?

A Yes, sir.

Q And these next pages are for the work of chopping holes in these other girders, 180, 181, 182?

A Or whatever number it was, yes. For any beam thereafter.

Q Were any tests made to these lifting loops on these girders that you know of as the engineer and as coordinator?

A Just the ones that Jess tested, Mr. Comer.

Q Did you hear of any testing?

A We did not test them, no.

Q And that's all this, this charge you are saying is the responsibility of Bayshore for these other girders?

MR. LYSAGHT: Your Honor, I object to this as irrelevant. This would require my client to dig below the surface of each of these lifting devices, and they are not experts in this line, and then take a chance. I think that's a question of law that your Honor will have to decide.

MR. GEEN: I object to Mr. Lysaght's statement.

THE COURT: What is your question to the witness? I didn't understand your question to the witness.

MR. GEEN: I had asked, I objected during Mr. Lysaght's questioning, I know this is very tedious, but I am trying to demonstrate a substantial portion of these charges, and which I am going to submit I am not going to argue with now to your Honor, only at the proper time, are not proper claims of damages against Bayshore. And I know it is tedious, I know of no other way of doing it.

THE COURT: Well, they seem to admit what you are trying to bring out, they admit that after the accident occurred, they thereafter examined one or two additional girders and determined that the lifting pad was not secure. They then proceeded to drill holes in all succeeding girders and to lift them by this new method. That is not disputed.

Now you can argue later that those were not proper charges against you, but we are spending a lot of time with the witness bringing out facts that they are not disputing. Isn't that what you were trying to bring out?

MR. GEEN: No. Excuse me, your Honor, for one moment.

May I say this: There has been no testimony in this case that they dug under any other lifting pads and found them not secure.

THE COURT: I think Mr. Comer did say he looked at at least one other --

MR. GEEN: Yes, he did.

THE COURT: And the witness has just said that.

MR. GEEN: Excuse me. He was quoting what he felt Mr. Comer had testified to, and if your Honor will --

THE COURT: All right. Mr. Comer is here.

Do you recall your testimony? Maybe he doesn't hear.

MR. LYSAGHT: He doesn't hear, your Honor.

MR. GEEN: May I please say, your Honor, that he said he saw rust, he didn't use the words --

MR. FISH: He said he dug into another one.

THE COURT: Yes, I seem to recall that testimony.

MR. GEEN: And he said he found rust, that's all, he didn't say anything about secure. He said rust.

MR. FISH: Yes, he didn't like it.

THE COURT: Well, the inference was that they determined that the rust condition may have weakened the wire.

MR. GEEN: Well, that's something else. That's something else.

THE COURT: Well, in any event, it's not disputed that they didn't go into the others.

MR. GEEN: Then may I ask your Honor this: In the event, and as I say, I didn't want to get into legal questions, in the event that you determine that perhaps part of this claim is not a proper claim, how are we going to break down these figures when they are not broken down as to what was chargeable to all these other girders and what was chargeable to this?

THE COURT: I don't know how we are going to break it down. The number of girders is not indicated there?

MR. GEEN: No, ma'am.

THE COURT: The total number of girders is not indicated there?

THE WITNESS: One moment.

THE COURT: The witness says one moment.

THE WITNESS: No, your Honor, I'm sorry.

THE COURT: All right, let's proceed.

BY MR. GEEN:

Q Am I correct, sir, that you have included in the charges, charges for your rents on the Century, payment for the Century when it wasn't operating?

A Yes, sir.

Q And the extra time you say it took to drill holes in all these girders?

A Yes, sir.

Q And the extra money for paying the Century for that?

A Extra money that we had to pay for the Century when it wasn't in operation.

Q Just when it wasn't in operation?

A When it was not lifting beams.

Q When it wasn't lifting beams. Well, while you were drilling the holes through all these girders, of course, it wasn't lifting --

A It was on our rental downtime that we had to pay for it until we were given permission to lift again.

Q By the new system?

A By the new system and by the Coast Guard that had to inspect the boiler and get the fire up in the boiler again.

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Q You have a charge here for a pickup truck and a chauffeur and bull points. Are bull points used to break up the concrete?

A Yes, sir.

Q Compressor operator?

A Yes, sir.

Q That's for all that work that was done on not this one girder, but all these girders?

A These are union requirements.

Q I didn't ask you that, sir.

MR. LYSAGHT: Your Honor, I would respectfully request that he permit the witness to answer the question before he interrupts.

MR. GEEN: I didn't ask him if it was a union requirement.

MR. LYSAGHT: Your Honor, I submit --

THE COURT: The question to the witness is whether this applies to all of those girders; is that right?

The figures that you have there apply to all of the girders which were subsequently installed; is that it?

THE WITNESS: The total figure, yes.

THE COURT: Now we have gone over that several times, Mr. Geen.

BY MR. GEEN:

Q Then after adding up -- I am not going to go through all of them -- but after adding all these figures for everything you reached a total, and then you took 25% off of the top of that; is that correct?

A Yes, sir.

THE COURT: 25% for what?

MR. GEEN: Well, he explains that 25% was for oil, tools they didn't have returned, 25% of the total of all these charges were added on. His explanation was that it was -- let's see, for oil --

THE WITNESS: It's on the exhibit.

THE COURT: It's on the summary?

THE WITNESS: Yes, ma'am.

THE COURT: All right.

BY MR. GEEN:

Q Small tools, right?

A Small tools and supplies, yes, sir.

Q That charge equalled $8,876.44; is that right?

A That's not just for small tools.

Q No, I didn't mean that. I mean the 25%. Right? And you have small tools and supplies.

A Yes.

Q Fuel oil, gas, water, shop stewards and maintenance engineer.

A Yes, sir.

Q And you totalled that by taking 25% of all these other charges for all these other girders.

A Yes, sir.

MR. GEEN: All right. I'm going to not inquire further on this, your Honor.

THE COURT: All right. Is there anything further of this witness?

MR. LYSAGHT: No, ma'am.

THE COURT: All right. Thank you. You may come down.

[Witness excused.]

THE COURT: Do you have another witness, Mr. Lysaght?

MR. LYSAGHT: No, ma'am.

At this time I will rest.

THE COURT: All right.

Are there any motions at the end of defendant

Kiewit's case?

MR. LYSAGHT: At this time, your Honor, on behalf of the defendant Peter Kiewit I renew my motions made at the conclusion of the plaintiff's case, and I move further for a directed verdict against Bayshore Concrete Products Company.

MR. FISH: At this time, your Honor, I am not sure whether this is the proper time for it, but if you are asking for motions, I shall move for a directed verdict against Kiewit.

MR. GEEN: At this time, your Honor, for the record I will renew the motion that I made at the end of the plaintiff's case and toward the plaintiff's complaint.

I will also move for a judgment dismissing the third party complaint of Peter Kiewit against Bayshore.

THE COURT: All right, Mr. Lysaght, taking your motions first, you are renewing the motion you had made initially with respect to the plaintiff's case; is that it?

MR. LYSAGHT: Yes, your Honor. Pro forma motion.

THE COURT: All right. That motion is denied.

MR. LYSAGHT: I respectfully accept, your Honor.

THE COURT: And you are moving for a directed verdict against a third party defendant, Bayshore?

MR. LYSAGHT: Yes, ma'am.

THE COURT: All right. What are the grounds for that motion?

MR. LYSAGHT: Well, on the ground that the provisions within the contract, your Honor, in my opinion, provide for absolute indemnification, that the only credible evidence before us is that if this casualty occurred, it could only have occurred by reason of a failure of the lifting loop which was supplied to us by Bayshore.

Now, it has been Bayshore's defense, I would respectfully designate it as speculation, that they failed to remove certain tackle or blocking which was securing this particular girder before the lift started, and that that increased pressure caused these lifting loops to fail rather than any inherent defect within the lifting bops themselves.

I respectfully submit, your Honor, that the evidence is overwhelming that did not occur. We have the uncontradicted sworn testimony of two men, the first mate, Whelan, and Mr. Jess Comer, that these particular girders were entirely free before the lift started, or at the time the lift started.

Secondly, we have the testimony of Mr. Freelund that it was an impossibility for this derrick to attempt to lift a weight of this particular 130 ton girder tied down to such an extent that the lift would have exceeded its safety factor of 3.5 which would total, I think, about 455 tons, plus the added tons of the lifting loop.

That is the basis of my motion, your Honor.

THE COURT: All right. Do you want to reply to that motion, Mr. Geen?

MR. GEEN: No, your Honor, no, I don't wish to reply to it unless your Honor wishes me to reply to it.

THE COURT: Well, he is making a motion for me to grant a directed verdict against your client. Now, you have nothing to say about that? He contends that the evidence is overwhelming and he relies on the testimony of Mr. Freelund that if as you contend they had failed to unleash the girder in the lifting operation, the barge containing the derrick would have turned over according to Mr. Freelund, if I understand his testimony.

MR. GEEN: Well, let me say this, your Honor: First, there will be testimony to the contrary, but forgetting about that, what Mr. Freelund says is that this had, under its own load when it was lifted, it had to fail because his conclusion with a reasonable degree of -- well, he didn't say engineering certainty, I don't know --

it couldn't sustain the load that was required, 130 tons.

But the proof is going to show, and your Honor, this came out, it was obvious to your Honor, that this had been loaded and this had been lifted, the proof is going to show it was lifted four times by these same lifting loops prior to the occasion when it fell.

So the evidence is going to be that four times it sustained its own weight of 130 tons by these lifting loops.

Now, on this day when it fractured, now for the first time, if you believe Mr. Freelund, it could no longer sustain that 130 tons.

I think that from the evidence that we have heard from Mr. Comer and from the mate there had been serious doubt on the question on whether these blocks were removed. And, as I have indicated, there will be testimony that the blocks were not removed.

THE COURT: You say the testimony of which witness creates this --

MR. GEEN: Both Mr. Comer, who finally admitted, or finally gave some indication that you are not going to move this away and those blocks away, and we have shown pictures to indicate that they were nailed in place.

There will be testimony that they would not fall away. The testimony that other tools would have to be used if you were going to remove this. Despite the fact that he didn't --

THE COURT: Remove what, the blocks?

MR. GEEN: To remove the blocks, yes. I am referring to the blocks.

THE COURT: What other tools? I don't understand. Did he testify that certain tools were used?

MR. GEEN: He said only a wrench. Nothing else was done. It was loosened and the block fell away.

THE COURT: I see.

MR. GEEN: That was his testimony.

THE COURT: All right. Then the defendent Kiewit's motion for a directed verdict against the third party defendant at the end of the defendant Kiewit's case is denied.

Now, Mr. Fish, I believe you renewed your motion.

MR. FISH: I think it was not a renewal. I think this is the first time I have made the motion.

THE COURT: I am sorry. All right.

MR. FISH: And I would assume that such a motion would be taken under consideration at the end of all of the evidence. I simply have made the motion at this time to preserve my rights to --

THE COURT: What is your motion?

MR. FISH: Motion for judgment against the defendant Kiewit. I think the evidence pretty conclusively shows that the complaint has been sustained against that defendant. The reason for it I argued extensively yesterday.

THE COURT: All right. The Court will reserve decision on your motion until all of the evidence is put in.

We are going to recess now until ten o'clock tomorrow morning, gentlemen. How many witnesses do you have, Mr. Geen?

MR. GEEN: Three, your Honor.

Your Honor, I was about to make a request. I understand that your Honor tomorrow morning at 9:30, I was told this morning --

THE COURT: We have a matter at 9:30?

THE CLERK: Yes, your Honor. The Pena case.

MR. GEEN: May I state my request, your Honor?

THE COURT: Yes. Just a moment. Well, then, we won't start until eleven in the morning in this case.

MR. GEEN: It's just that Judge Saypol had asked to see me and I think I can accomplish that before eleven o'clock, your Honor.

THE COURT: All right. And you have three witnesses, which means we should conclude tomorrow, is that it?

MR. GEEN: I believe so, yes, your Honor.

THE COURT: Well, I certainly hope so. And I hope it doesn't go until Monday.

All right, gentlemen, eleven o'clock tomorrow morning.

[Court recessed.]

[Time noted: 4:25 p.m.]

* * *

RAYMOND INTERNATIONAL

-against- 70 Civ. 2712

PETER KIEWIT SONS COMPANY, etc., et al.

New York, June 7, 1974;
11.20 o'clock a.m.

(Trial resumed.)

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(In open court.)

THE COURT: You may proceed.

MR. GEEN: Your Honor, defendant Bayshore calls Thomas Koppinger.

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THOMAS KOPPINGER, called as a witness by the defendant Bayshore, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GEEN:

Q Mr. Koppinger, by whom are you employed?

A By the, currently the office of Kirk & O'Connel.

Q They are house counsel for Liberty Mutual Insurance Company?

A That's correct.

Q For the Brooklyn office, is that?

A That's right.

Q In or about April of 1970, by whom were you employed?

A Liberty Mutual.

Q Whose office, what office were you associated with then, sir?

A At that time it was Craig & Geen, New York Contracting Risks.

Q What was New York Contracting Risks? I mean, what particular matters did they handle at that time?

A We handled claims arising from construction projects.

Q What was your position with them at that time?

A I was a supervisor.

Q Did there come a time in and about April of 1970 when you received a report of an accident that occurred o n a job that a Liberty assured, Bayshore, was connected with?

A Yes.

Q Did there come a time when you made a visit to the site of the accident?

A Yes.

Q Can you tell me approximately when? How long after the --

A I believe it was the day after I received the report.

Q When you went to the site, sir, did you meet with anyone there who was employed at the site?

A I met with several different people.

Q Did you meet with anyone in this room?

A I met with this gentleman here (indicating), I think his name is Cunningham, who is the project superintendent --

THE COURT: Would you please keep your voice up so I can hear?

THE WITNESS: I'm sorry.

THE COURT: You met with whom?

THE WITNESS: I met with the project manager, or project superintendent of Peter Kiewit & Sons.

Q You said he was what?

A I think it was Cunningham.

Q Are you party to the gentleman in the white jacket sitting back there?

A Yes.

Q I believe that witness has identified himself as Comer.

On that occasion was any discussion had in relationship to your obtaining the lifting loops on a girder that had failed?

A Yes.

MR. LYSAGHT: Two things, your Honor.

No. 1, I object to the form of the question as being leading and suggestive; secondly, your Honor, I would submit that any conversations had after the accident would not bind the particular parties.

THE COURT: Well, just a minute now. I don't understand that. We are talking about what happened on the day after the accident, or the day after; is that it?

MR. GEEN: The day after.

MR. LYSAGHT: I am sorry, m'am, but he said that he reported to the site of the accident the day after he received the report. Now, I don't know when he received the report.

THE COURT: Oh, I see.

Well, what time are we talking about? In any event, your objection is overruled as not binding on any of the parties, and as to form, ask him what occurred.

MR. GEEN: Can I withdraw that question and put a different question?

THE COURT: All right.

Q Mr. Koppinger, did there come a time when certain lifting loops were delivered to you?

A Yes.

Q By whom were they given to you?

A By the project superintendent.

Q Is that the man you previously identified seeing in court?

A Yes.

Q Was that some time after your first visit?

A Yes.

Q Would you tell us the circumstances surrounding Mr. Comer giving you the lifting loops?

A The first time they arrived at the job site I requestec that they be saved so that they could be inspected, and I was told that the loops were still attached to the girder on the bridge and that when he got a burning crew with the use of an acetylene torch up there they would take these off and save them for me.

I later made a few telephone calls, and at one of those telephone calls he said the loops were there and I could come down and pick them up. I got down to the trailer and met with him --

Q When you say met with him, are you still speaking about Mr. Comer?

A Mr. Comer. I met with him there, simply asked if he had the loops. He said yes, they had them, they were here.

I said, these are the two lifting loops that caused the accident? He said, yes, and I took them, I gave him a receipt and I left.

Q After you took the lifting loops did you deliver them somewhere? Did you transfer them to somebody else?

A I took them to my office and some short time later, I couldn't tell you how long, I had given them to one of my subordinates to have them examined by a metallurgist.

Q What megallurgist was that?

A I believe it was Lucius Pitkin.

MR. GEEN: I have no further questions.

THE COURT: You may cross-examine, Mr. Lysaght.

MR. LYSAGHT: Thank you, your Honor.

CROSS EXAMINATION

XX BY MR. LYSAGHT:

Q Mr. Koppinger, when you received notification of this casualty did that come to you by phone or in writing?

A I believe it came by phone.

Q When you received this information did you have to make up a file?

A Yes.

Q May I see the initial file that you made up?

A I don't have it in my possession.

Q Is it in court?

A I don't know.

Q Well, sir, as I understand it when the call came in you made up a file and that file would indicate the date and the time you got notice of this casualty; is that correct, sir?

A That's right.

Q Did you look at that file before you came to court?

A No, I didn't.

Q When Mr. Geen asked you when you visited the site, you said, I believe, a day after I received the report; is that right?

A That's right.

Q So the report would indicate when you arrived at the site; is that correct, sir?

A That's right.

Q Did you use anything to refresh your recollection?

A No, sir.

Q Is that file back in your office, sir?

A I don't know the whereabouts of the file quite frankly. I have been transferred to two other offices since that time.

Q Would this be what they call a claim file?

A Yes.

Q Would that be up here in the New York office?

A I believe it should be.

THE COURT: Could you keep your voice up, please?

THE WITNESS: Sorry.

Q Do you know who called you?

A No, I don't.

Q Was it a representative of Bayshore?

A I don't know.

Q Was it a representative of Raymond International?

A I don't know.

Q Was it a representative of Peter Kiewit?

A I don't know. If I had the information, but, I'm sorry, I haven't.

Q Do you recall where you were, Mr. Koppinger, when you got the report?

A In my office at my desk.

Q When you got the report, sir, did you write down what was told to you?

A I don't know.

Q Did you ask how the casualty happened when you got the report?

A If I might say something, I don't know if I received it by mail or by phone. Had I received it by phone -- excuse me a moment. I was not the first person to have received that, and it was by telephone, but I wasn't the first person to receive it. While the gentleman was on the phone accepting the report he called my attention to it and gave it to me.

Q Who was that individual, sir?

A Mr. Joseph Letta.

Q Is Mr. Letta still employed by Liberty Mutual?

A Yes, he is.

Q Is Mr. Letta still associated with the New York office, Mr. Koppinger?

A No, he is in Brooklyn office.

Q With you?

A Yes.

Q To your knowledge, sir, did Mr. Letta write up a report?

A I believe he did.

Q Do you have that report?

A No, I don't.

Q Now, sir, did Mr. Letta tell you what happened?

A I don't know if he told me what happened, or it was simply a situation where he had handed me what he had written down.

Q Initially, sir, when the report of a casualty comes in was it your practice, or the practice of your office, to say, well, how did it happen, and write down briefly what was related to you?

A That's right. Yes it is the practice.

Q And that report would indicate the first version of what had transpired; is that correct, sir?

A Perhaps so.

Q By whoever called you?

A Yes.

Q And since Bayshore was your insured, it is likely that the report came from someone from Bayshore?

A That's also likely it could have come from another source. I can't say exactly what the source was. I don't know.

Q When you went out to the site you say it was a day after you received the report, Mr. Koppinger?

A I believe it was the next day, yes.

Q The day after you received the report?

A That's correct.

Q And you don't recall when you received the report?

A The specific date and time, no.

Q You went out to the job site; is that correct, sir?

A That's correct.

Q Did you go out there alone or did you take anybody with you?

A I went alone.

Q When you arrived at the job site did you see the scow where the T-beams were located?

A From a distance, yes.

Q Was the scow still out in the water?

A Yes.

Q Did you go aboard the scow?

A Yes, I did.

Q Who took you out?

A Peter Kiewit & Sons, it was on a tugboat.

Q Do you know who accompanied you out there?

A I don't know the gentleman's name, but it was an engineer employed by Peter Kiewit, a man in his 30's. I believe he had blond hair.

Q As the tug approached the scow did you board from the tug onto the scow?

A That's correct.

Q And the tug naturally created waves as it approached the scow; is that correct, sir?

A I presume it did.

Q When the tug came abreast of the scow did it come into contact with the scow before you got onto it?

A I couldn't tell you.

Q In other words, the two vessels had to meet; is that correct?

A They met, but at what speeds, and so forth, I couldn't say.

Q Were the T-girders that were on the scow bolted down or secured in some fashion?

A Yes, they were.

Q Were there vice-like objects, or blocks holding the T-girders in place?

A That's correct.

Q Were you familiar with this type of claim, Mr. Koppinger?

A Not regarding -- well, what do you mean by this type of claim?

Q Well, an admiralty claim, or a claim involving vessels on the water?

A I don't believe I am an expert in it, no.

Q No, I don't mean that, Mr. Koppinger. I just mean, did you work on a number of claims like this?

A No.

Q Were you aware, sir, that it is good practice to secure anything aboard a ship when vessels are passing it or approaching it?

MR. GEEN: This is objectionable, your Honor.

THE COURT: To secure anything aboard a ship?

MR. LYSAGHT: Yes, ma'am. When vessels are passing or approaching.

THE COURT: Well, he says he is not an expert in admiralty, and I don't know he would know that.

MR. GEEN: May I further state I have not objected before, but all this questioning is way beyond the scope of the direct examination which was just to establish the obtaining of the lifting loops and delivery to a metallurgist.

THE COURT: Yes, we may not have the right witness here for that kind of --

MR. LASAGHT: I think he is an interested witness, your Honor.

THE COURT: What was your position at the time?

THE WITNESS: I was a supervisor.

THE COURT: Of what?

THE WITNESS: Of Liberty Mutual INsurance Company, claims supervisor.

THE COURT: I see.

MR. LYSAGHT: Which would make him an interested witness, ma'am.

THE COURT: Well, as Mr. Geen points out, his testimony relates only to receipt of the loops which broke, and that is all he has testified about. He doesn't purport to know anything else.

BY MR. LYSAGHT:

Q Mr. Koppinger, when you went out onto the scow did you observethe T-girder? The one involved in this casualty? The one involved in this casualty?

A No.

Q You didn't?

A The T-girder was already up on the bridge.

Q It was already up on the bridge?

A Yes.

THE COURT: The T-girder in question?

MR. LYSAGHT: Yes, ma'am.

Q And did the --

A Excuse me. Excuse me. I can't tell you if it was on the bridge or they were in the process of putting it up. I believe it was on the bridge, I can't be sure.

Q Would you have made a memorandum as to where it was?

A Yes, I would have.

Q And that would appear in this file that is not in court; is that correct?

A That's correct.

Q Was it part of your duties, sir, as a supervisor in the claims department to take statements?

A Yes, it was.

Q Did you take a statement from anybody?

A Well, it wasn't necessarily part of my functions, but I did.

Q I beg your pardon, sir?

A Normally a supervisor doesn't do the investigation himself.

Q I realize that.

A But in this instance I did, and I did take a statement.

Q From whom did you take statements, sir?

A I believe I had taken a statement from the captain of the vessel Century.

Q May I see that statement, sir?

A I do not have it with me.

Q Where is it?

A I presume it's with the balance of the file.

THE COURT: I wish you would talk so that I can hear you.

A I do not know the whereabouts of it. I presume it's still in the file that was created.

Q And that statement would indicate the captain's version of what happened: is that correct, sir?

A Yes, it would.

Q Did you take a statement from anyone else except the captain?

A I don't believe I did.

Q Did you take a statement from this man that you identified as Mr. Cunningham, or we know to be Mr. Comer?

A I'm quite certain that I did not.

Q That's the only statement you took?

A I believe so, yes.

Q Did you take any snapshot or any photographs at the site?

A Yes, I did.

Q May I see them, sir?

A I do not have them with me.

Q Where are they?

A I presume they are still in the file.

Q And that is not in court; is that right? Those photographs are not in court?

A I have not seen that file for two years at the very least.

Q Did you take snapshots which would indicate whether or not the girder was bolted or secured when you got onto the vessel?

A You mean the girders that were on the scow?

Q Yes, sir.

A I believe I did, yes.

Q And you don't have them in court?

A No, I do not.

Q Qnd you don't recall whether this particular girder in which that was involved in this casualty was on the scow or was up on the bridge?

A I can't be certain of its location. I believe it was on the scow, but that would be speculation on my part.

Q You were told that the cables were broken; is that correct?

A That's correct.

Q Did you make a visual inspection of the cables when you went out there on the scow?

A I believe the first time I saw the cables that were involved in this the girder was on the bridge. Now, again, I can't remember if on the day that I first arrived there that girder had already been put in place or was still on the scow, or perhaps was in the process of being placed on the bridge. But the first time I saw the loops themselves was on the bridge.

Q Would you tell us how that girder appeared when you saw it? In other words, in what position was it? With reference to the bridge and with reference to the water?

A When I first saw the girder?

Q Yes, sir.

A Well, if it were not on the scow I would have first seen it from the scow looking up at the bridge.

Q But what I mean is this:

Was this particular girder sticking up out of the water, or was it placed and running parallel with the bridge?

A It had been placed -- it was either on the scow or on the bridge and placed in its final position on the bridge.

Q You don't recall which. But in its final position on the bridge, sir, could you tell us how it appeared? In other words, did it come up from the water and support the bridge, or was it horizontal to the bridge?

A It was horizontal.

Q Horizontal with the bridge?

A Yes.

Q Did you look at the cables at that time?

A At which time?

Q When you saw the girder in a fixed position on the bridge?

A Yes, I saw the cables which had snapped, yes.

Q Did you see any other cables coming out?

A Out of the same girder?

Q Out of the same girder, yes.

A Well, there were four on each girder so I had seen all four of them, yes.

Q You saw all four of them? And was some of them snapped and some of them not snapped on this particular girder?

A I believe all four were snapped.

Q Were there any other girders not involved in place next to this girder? Is that correct?

A That's correct.

Q And these particular girders, these other girders not involved, did they also have loops projecting from them?

A Some of them did.

Q Some did and some didn't?

A Yes.

Q When you were out there at the site did you see iron workers burning these objects off the girders?

A They do that, yes.

Q Approximately how many girders did you observe that particular day which had these lifting looks coming out of them?

A It would be an approximation. I couldn't really --

Q Well, I appreciate that --

A There were several more than the one that was on the bridge.

Q What do you mean by several more, sir?

A Well, the whole bridge was composed of these girders. There might have been 200 of them on the bridge. Now, how many of them still had the loops and how many of them had them off, I couldn't tell you.

Q And each of those 200 girders would have four loops emitting from them before they were burned off; is that correct?

A That I don't know. Some of them may have only had two. I didn't examine all of them.

Q Did you make a notation, sir, as to how many loops were projecting from the girders that you observed?

A From all of the girders?

Q Yes.

A No.

Q Where were you when you made this observation?

Were you in the water or were you up on the bridge?

A I was up on the bridge.

Q How far were you from the lifting loops that you observed?

A When I was on the bridge?

Q Yes, sir.

A I was right on top of them. As a matter of fact, I touched them. That's how close I was.

Q How long did you remain there?

A On the bridge, I couldn't tell you. 10, 15 minutes perhaps.

Q Did you take any snapshots at that time?

A Yes, I did.

Q Do you have them in court?

A No, I do not.

Q They are in the file?

A I presume they are.

Q Then you left; is that correct?

A I didn't leave the job at that point, no.

Q No, sir, but you left the bridge?

A I left the bridge.

Q Was that the very first time that you saw the lifting loops that you claim were involved in this accident?

A Yes.

Q Now, sir, was anyone with you on the bridge when you looked at the lifting loops?

A Yes.

Q Who?

THE COURT: Now, these are the broken ones we are talking about now?

MR. LYSAGHT: Yes, ma'am.

A Yes, there was an engineer who was employed by Peter Kiewit.

Q What was his name?

A I really don't KNOW.

Q Could you describe him?

A He was a young man fellow, about 33 years of age. I believe he had blond hair, maybe weighed 150, 160. All I know is that he was an engineer employed by them.

Q Did you write down his name, Mr. Koppinger?

A I believe I did, yes.

Q Did you then return to your office?

A No.

Q You went back to the job site?

A I went back to the trailer, yes.

Q Did you ever return to the bridge?

A To the bridge itself?

Q Yes.

A Gee, I don't -- you know, not with respect to this accident, no.

Q Did you then when you returned to your office make out a report of what you observed, or what had transpired?

A Yes.

Q Do you have that report with you, sir?

A No, I do not.

Q Did you use that report to refresh your recollection?

A No, I did not.

Q Would that report tell us what you observed on that particular day over four years ago?

A Presumably it would.

Q Did you take any other statements after you got off the bridge?

A I don't believe so.

Q Was this the one and only time that you saw this particular loop when you were in the presence of this blond haired individual whose name you don't know and you looked at it on the bridge?

A I looked at it onthe bridge, and at that point I asked them when they were going to be burned off so that I secure them.

Q And this young man told you that?

A He said, yes, they will be burned off in a few days, and when they are we will give you a call. And later I called the job site and asked them if the loops had been burned off, I also had spoken to Mr. Cummings --

Q Wait, if I may, Mr. Koppinger.

Whom did you speak to when you phoned and asked if the loops had been burned off?

A I don't know who I spoke to.

Q Did you make a note of the name of the individual to whom you spoke?

A When I asked with respect to the lifting looks being burned off?

Q Yes.

A I don't know.

Q And of course that information would be in the file, that is not in court; is that correct?

A I don't know where the file is.

Q Now, sir, how long after that were certain objects presented to you that were described as lifting loops?

A I really can't say. I believe it was about a week, 10 days.

Q Did these objects have any labels or tags on them?

A Yes, they did.

Q Who delivered them to you?

A I picked them up at the job trailer from Mr. Cummings.

Q Were there any other lifting loops around?

A No, sir.

Q How many lifting loops did you obtain?

A Two. I believe it was two. I'm quite certain it was two.

Q Do you have any of these loops in court?

A I don't have them, no.

Q Have you seen them this morning?

A No, I have not.

Q Are you aware of the fact that four looks broke?

A Yes, I am.

Q Now, sir, did you take these loops into your possession?

A Yes, I did.

Q And did you then give them to somebody else?

A I gave them to one of my subordinates, yes.

Q How long after the casualty was it that you gave them to your subordinates?

A I couldn't tell you.

Q Did you direct your subordinate to take them to a metallurgist?

A Yes, I did.

Q Did you direct your subordinate to submit them to an engineer or someone other than a metallurgist?

A No, I did not.

Q Were they submitted to one metallurgist or more than one metallurgist?

A I had submitted them to one metallurgist.

Q And the name of that metallurgist was what, sir?

A I believe it was Lucius Pitkin.

Q You believe?

A Well, my general recollection is that that's where they would have been sent.

Q Did your firm employ any other metallurgist at that time?

A They are an independent metallurgist, but generally for something such as this that's where they were sent.

Q Mr. Koppinger did your firm, the Liberty Mutual, at that time employ one firm of metallurgist, or did you retain the services of other firms of metallurgists?

A There were several firms it could have been sent to, yes. My recollection is that they were sent to Lucius Pitkin.

Q But it could have been initially sent to another firm; is that correct?

A It's extremely unlikely.

Q But it is possible?

A Yes.

Q Did you receive a report of the findings?

A Yes, I did.

Q Do you have that report with you?

A No, I do not.

Q Is that report in the file?

A I presume it is.

Q Were these objects that were presented to you, these cables, ever examined by anyone other than this firm that you described? To your knowledge.

A They could be. I'm sure that any number of different people who had an interest in thisi had them examined.

Q Were there other reports submitted to you beside the firm of Mr. Pitkin?

Were any other reports submitted to you?

A No.

Q And if they were they would be in the file, is that correct, Mr. Koppinger?

A There wouldn't be any if they weren't submitted, so -- I don't recollect any other reports being submitted.

Q Did you take a statement from Mr. Jess Comer?

A No, I don't believe I did. It's possible, but I doubt it.

MR. LYSAGHT: I have No further questions, your Honor.

Thank you, Mr. Koppinger.

MR. FISH: Mr. Geen, do you have the report that was made by this witness in court?

MR. GEEN: I may have. Not here. You will have to give me some time to check. I believe I have pictures that were referred to. I believe these are the pictures. You will have to ask the witness.

Do you want me to do this now?

MR. FISH: Well, we need them, that's all I have for cross-examination of this witness.

I might add, your Honor, that I pondered the interrogatories to Bayshore and I asked about reports and my recollection is the answers were that they just weren't available.

MR. GEEN: I believe the answer was "Work product of the lawyer."

MR. FISH: Not for that.

THE COURT: Well, what report are we talking about? Notes made by this witness?

MR. FISH: Any report that he made.

Question 17 in the interrogatory was:

"Was any investigation by or on behalf of Bayshore Concrete Products Corp. made with respect to the casualty described? Plaintiff's complaint?

"Answer: Yes. If your answer is yes, state when, where and by whom such investigation was made and attach copies of all investigation reports or state substance of all findings and conclusions, recommendations made therein."

The answer was:

"Not available at present time."

My inquiry concerning the report you say --

MR. GEEN: There was another file in court which has been stored over in the Supreme Court, New York County. Mr. Walsh just left to get it. Until I examine that I won't know.

CROSS EXAMINATION

BY MR. FISH:

Q Were these the photographs that you took that you have referred to (handing)?

A Yes, those are mine.

Q And those were taken while the girder was in its final position up on the bridge?

A That's correct. From these i believe he asked before where the girder was, I believe it was on the bridge when I arrived at the job site.

MR. GEEN: Mr. Fish, excuse me. There is another group, I don't know, you will have to ask him if he took these, too, (handing).

Q Are these also part of the set of photographs you took (handing)?

A Yes, they are.

Q And those photographs show a hole pierced on the top of the girder.

Do you know why that hole was made?

MR. GEEN: Your Honor, I just want to again state my objection. This examination also, as well as Mr. Lysagh's, is going way beyond the direct examination.

THE COURT: Well, I gather it is fairly within the scope. He was called to testify that he received these loops; isn't that so?

MR. GEEN: Yes.

THE COURT: Well, it is within the scope. They can ask him how he received them and what he did in connection with the receipt.

MR. GEEN: No question about that. But he is now being asked the purpose of some holes in the girder.

MR. FISH: I just want to identify the time of the taking of these pictures. They are obviously taken at some time subsequent to the casualty. The testimony has been that the holes were pierced in these beams so they could use a different method of slinging.

1 THE COURT: Yes.

MR. FISH: And my question to the witness is, do those photograph show the holes that were made for that purpose.

THE COURT: Yes.

You may answer that.

MR. GREEN: The photographs speak for themselves.

THE COURT: Well, he can answer if he knows.

BY MR. FISH:

Q Do you know?

A I believe so.

MR. FISH: I offer these sets of photographs in evidence.

THE COURT: Is there any objection?

MR. GEEN: No objection.

MR. LYSAGHT: No objection, your Honor.

MR. FISH: I suggest we mark each sheet separately, and these will be, according to my records, Plaintiff's Exhibits Exhibits 7 and 8.

(Plaintiff's Exhibits 7 and 8 were received in evidence.)

THE COURT: May I see those photographs, please? All right.

MR. FISH: That is all I have at this time, your Honor.

I suggest the witness be excused and be asked to remain present pending the possible receipt of his investigation file.

THE COURT: All right.

Thank you, you may come down.

(Witness excused.)

THE COURT: Do you have another witness, Mr. Geen?

MR. GEEN: Yes, your Honor.

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EMANUEL SILKISS, called as a witness by the defendant Bayshore, being first duly sworn, testied as follows:

MR. GEEN: If it is all right with the Court I will wait until the luncheon recess for that search.

THE COURT: For what search?

MR. GEEN: The report of Mr. Koppinger.

THE COURT: Do you have it here?

MR. GEEN: This additional file has been delivered to me and I have to go through it.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. GEEN:

Q Mr. Silkiss, by whom are you employed?

A Lucius Pitkin, Incorporated.

Q What is the business of Lucius Pitkin?

A We are metallurgical consultants, chemists, analysts, laboratories.

Q How long have you been employed by Lucius Pitkin?

A Since 1947.

Q Do you yourself have any professional qualifications?

A Yes, I do.

Q Would you please tell the Court what your qualifications are?

A Yes.

I have a Bachelor of Science in engineering in metallurgy, Bachelor of Science in engineering in chemical engineering, Master of Science in metallurgical engineering, all from the University of Michigan.

I have done postgraduate work at New York University. I have taught on the adjunct staff at Brooklyn Polytech Institute, and am a registered professional engineer, metallurgy, Pennsylvania and California.

Accredited corrosion specialist, accreditedd by National Association of Corrosion Engineers.

Member of various technical societies, American Society of Testing Materials, American Society for Metals, American Institute in Mining, Metallurgical Engineers, American Welding Society and American Association of Corrosion Engineers, American Society of Mechanical Engineers.

Q Some time in 1970, sir, -- by the way, do you have a copy of a written report with you?

A Yes, sir, I do.

Q Of an examination you made?

A Yes.

Q If necessary you can use it to refresh your recollection. If you don't need it to refresh your recollection don't use it.

All right?

A Thank you.

Q Did there come a time in 1970 where you received two lifting loops from Liberty Mutual INsurance Company?

A That's correct.

Q Can you tell us the date of that receipt, sir?

A I will have to refer to my file.

Q You can.

A It would be on or about August 6, 1970.

Q Did you make an inspection and perform certain tests on these lifting loops, Mr. Silkiss?

A Yes, I did.

Q As part of your report, inspection, did you take a photograph of the lifting loops?

A I did.

Q I show you this photograph and I ask if that is the photograph you took (handing)?

A Yes, that's the photograph.

MR. GEEN: I offer it into evidence.

MR. FISH: No objection.

MR. LYSAGHT: Yes, I object, your Honor, on the following grounds:

There has been insufficient foundation laid connecting the object that he photographed and/or the objects that he examined with the particular loops involved in this incident.

As your Honor will recall --

THE COURT: I thought he just testified he took pictures of those.

MR. LYSAGHT: Of looks presented to him in August, ma'am. If this is --

THE COURT: I see.

MR. LYSAGHT: In other words, this accident happened back in April. Now, there is inadequate evidence to connect this particular loop with the loops that this gentleman examined, or photographed, with the actual loop involved.

THE COURT: Well, what do you say, Mr. Geen?

MR. GEEN: I say that the witness, Mr. Koppinger, testified that these loops were delivered to him by an employee, a superintendent, project superintendent, Mr. Comer who when he delivered them said that these were the loops that failed. That is the employee of Mr. Lysaght's client.

THE COURT: Well, the prior witness I thought testified that he received them and that is the whole point in putting him on.

MR. GEEN: Yes, he received them initially and then he transferred them to Lucius Pitkin. I have the chain from Mr. Koppinger --

THE COURT: Is that what he has testified to? I thought he received them from Mr. Comer.

MR. GEEN: No, no. Mr. Koppinger received them from Mr. Comer, Mr. Lucius Pitkin received them from Mr. Koppinger.

THE COURT: I see. Has testified to that?

MR. LYSAGHT: No, ma'am. If I may, your Honor --

THE COURT: Well, all right, let's --

MR. LYSAGHT: He just said they were received by him on or about August 6, 1970.

THE COURT: Well, let's see what he testifies to about receipt of those.

BY MR. GEEN:

Q Do you know, did you receive these lifting loops, you said from Liberty Mutual Insurance Company?

A That's correct.

Q Do you know who actually physically delivered them to you from Liberty Mutual Insurance Company?

A No, I can't be sure. It may have been --

MR. LYSAGHT: Your Honor, I move that everything after "No" be stricken.

THE COURT: All right.

Q Did you address your report to a particular person at Liberty?

A Yes.

Q What was the name of that person?

A Mr. Hickey.

MR. GEEN: All right.

Now, if Mr. Lysaght is going to persist in this objection I am going to recall Mr. Koppinger to ask him the name of his assistant and who he gave the lifting loops to to deliver to Lucius Pitkin.

MR. LYSAGHT: Your Honor, I would respectfully submit that that is irrelevant and immaterial. The mere fact that he instructed someone to give them to Mr. Silkiss, or Mr. Pitkin, is irrelevant and immaterial.

Secondly, your Honor, I think that my objection has even more foundation going back to the site of the incident in question. Mr. Koppinger's testimony is that he was on the bridge and observe some 200 girders, some of which had eyelets projecting out of them, some of which did not.

Now, it was testified before that these loops were used to lift the girder and place them in position on the bridge and that thereafter they were burned out. There is no testimony here by anyone who burned out the actual loops involved In this incident. For aught that would appear they could have burned out ones from other girders and that would seem more reasonable, your Honor, because there were four loops involved here, and we only have two.

I respectfully submit, your Honor, I think there is an inadequate foundation laid for the identification of the loops that Mr. Silkiss examined and photographed with the ones involved in this accident.

THE COURT: Well, do you want to put Mr. Koppinger back on to testify that he gave them to an assistant who in turn delivered them to Mr. Silkiss?

MR. GEEN: Yes.

THE COURT: All right.

MR. GEEN: If Mr. Lysaght so requires.

Will you step down for a moment, Mr. Silkiss, please.

MR. LYSAGHT: He can tell from here.

MR. GEEN: Can he tell from here?

THE COURT: All right.

MR. GEEN: Mr. Koppinger, what was the name of your assistant at that time to whom you gave the lifting loops?

MR. KOPPINGER: Robert Hickey.

MR. GEEN: Can you spell that?

MR. KOPPINGER: H-i-c-k-e-y.

MR. GEEN: Was he the one that you told to bring it to Lucius Pitkin?

MR. KOPPINGER: Yes.

MR. GEEN: And, Mr. Silkiss, your report was addressed to Mr. Hickey?

THE WITNESS: That's correct.

MR. GEEN: Was it customary to make the report out to the one who asked you to make the --

THE WITNESS: He was the one with whom I was corresponding and discussing with this matter of the loops.

MR. LYSAGHT: Irrelevant and immaterial, your Honor. Whether or not he corresponded with him.

THE COURT: Overruled.

MR. LYSAGHT: I respectfully except, your Honor.

May I ask Mr. Koppinger a question form here, your Honor?

THE COURT: All right.

MR. LYSAGHT: Mr. Koppinger, how long were the loops in your possession before you delivered them to Mr. Hickey?

2 MR. KOPPINGER: Until August.

MR LYSAGHT: In August. So from the time you got them up until August, and you can't tell us when they physically came into your possession?

MR. KOPPINGER: They came into my possession a week to 10 days after the incident occurred. I had gone down a week to 10 days after my first visit to that particular job site.

MR. LYSAGHT: And between the time they came into your possession and the time they were given to Mr. Hickey where were they kept?

MR. KOPPINGER: They were kept in my office. Excuse me, we have a locked cabinet in our office.

MR. LYSAGHT: Did you personally hand them to Mr. Hickey?

MR. KOPPINGER: Yes, sir.

MR. LYSAGHT: I still press my objection, your Honor.

THE COURT: Overruled.

x (Bayshore Exhibit XXIII was received in evidence.)

Q Mr. Silkiss, would you tell the Court what examination, what tests you made of these loops and what your findings were?

MR. LYSAGHT: Your Honor, may I have a continuing objection to this line of questioning so that I won't interrupt the continuity of the trial?

THE COURT: On what ground?

MR. LYSAGHT: Well, your Honor, on the previous grounds stated that no proper foundation has been laid.

THE COURT: That was overruled.

Do you have another ground?

MR. LYSAGHT: Yes. May I have a continuing objection in that regard, but secondly and more importantly, your Honor, the testimony was that there were four loops involved here.

THE COURT: Well, you can cross-examine about that. He is going to tell us about the two he examined, he can't tell us about something he didn't examine.

MR. LYSAGHT: Thank you, your Honor.

A Yes, we made several examinations. The examinations included visual examinations, that is measurements of the loops, observations.

Q By the way, Mr. Silkiss, I don't know if I threw you off before. For the exact measurements, et cetera, will you need to use your report?

A Yes.

MR. GEEN: With the Court's permission, may he use the report?

THE COURT: Yes.

A Do you want the actual detailed data?

Q Yes.

THE COURT: No. If you have to refresh your recollection use your report, but tell us as best you can what you did and what you found.

A All right.

First we made visual examination. We measured the length of the loops, their general appearance. Took photographs and measured the diameters of the wires, the nature of the wires and the strands that were used in making up the loops. Observed that one end was cut, one end of each loop was cut, and the opposite end was fractured, torn apart by the conditions that brought about failure.

We made measurements of the wires and compared it with a specification of the material that was allegedly used in making up the loops.

Q What was the measurement of the wires?

A We found that each strand was composed of -- I mean each loop was composed of three strands. Two strands which were 7/16-inch diameter, and one strand of half-inch diameter.

Each strand in turn was composed of seven individual wires, a center core wire and six outer wires helically wound about the center core wire.

We made measurements of these wire diameters and compared it with the specification of which materials have been made.

We then took representative wires and performed tensile tests, breaking strength tests on the wires and showed that these particular wires we tested conformed to the specification minimum strength requirements.

We ran composition determining the alloying elements of the wire which we have a report stating the amounts of carbon, manganese, phosphorous, sulfur and silicate, identifying the type of wire and being of a normal type used in what is called Grade 270 according to ASTM 416, I believe it is.

Q Now, you have used ASTM; is that the American Society of --

A Testing Materials.

Q (Continuing) Testing Materials?

A That is correct.

Q Is there a characterization for this type of cable? Is it pre-stressed?

A Well, in its ordinary use pre-stressed in concrete fabrication it's a pre-tensile load. It's a very high strength steel wire. If you would like to -- if you want me to I can read into the record the results which we obtained.

Q Instead of reading it you are not permitted to read your report, but can you read it and give us a summary if it refreshes your recollection as to the findings, and if you would, the significance if any of the findings?

MR. LYSAGHT: Your Honor, may I?

THE COURT: Yes.

MR. LYSAGHT: Is the exnibit here? Or, are the exhibits here?

MR. GEEN: No.

THE COURT: What exhibit?

MR. LYSAGHT: The objects that he tested.

THE COURT: You are asking whether the loops themselves are present?

MR. LYSAGHT: Yes, ma'am.

THE COURT: Do you have the loops themselves?

THE WITNESS: No, ma'am.

MR. LYSAGHT: Well, I will object to this, your Honor. He is reading from a hearsay document, a report which was made almost four years ago.

THE COURT: No, he is permitted to look at his report to refresh his recollection.

Proceed. Tell us what you found.

THE WITNESS: Well, as I stated, the individual wires exceeded the minimum tensile strength requirement of the grade material that was to have been used in these loops. They were satisfactory in that regard.

MR. LYSAGHT: Your Honor, I will object to that as constituting a conclusion. No facts were given as to the types of tests, the type of tensile test, that is the load applied to the wires.

THE COURT: Well, you can cross-examine him about it. You can't object to what he is saying. He is telling us what he found. On cross-examination ask him about these things. How he arrived at that.

All right, proceed. What else did you find?

THE WITNESS: We made measurements of the wires and found the diameters of the individual wires to be in conformance with the specification. We made a metallographic examination of the individual -- well, first, excuse me, we first examined all the broken ends and broken ends of the wires would be characterized as what we call cupcone or ductile sheer fractures. That means that metallurgically that each wire before breaking deformed considerably, exhibiting a certain degree of ductility and toughness and then when it reached the limit of its deformation, fractured.

This is characteristic of the individual wires being loaded to beyond their load carrying capability. We made little specimens, cut off the ends of the broken wires, mounted them in special plastic, ground polished it so we could examine a longitudinal cross-section through the fractures, and we found that there was no metallurgical defects of discontinuities in the way of the fractures, merely that the wires had broken because of the tensile overload.

The metallurgical microstructure of the wires was revealed by etching with chemical reagents, again examined under the microscope, and it was shown to have a normal structure for this type of steel.

Q You took in your examinations, for example, your microstructure at the fracture cite, you took photographs of that, did you not?

A Yes, that's correct.

Q And you took a photograph of longitudinal microstructure?

A That's correct.

Q And a transverse microstructure?

A That's correct.

Q And all those photographs are contained in your report?

A That's right.

Q Did the examination you made of the fracture sites -- By the way, you said your examined the fracture sites. Was that on both --

A Both loops.

Q (Continuing) Both loops?

A Yes.

Q Did they reveal any defect in the wire that caused a fracture, any cracks or other defects?

A No, there were no secondary cracks. There was
no significant corrosion. There was no unusual breaks.
43 All the breaks showed characteristic deformation in
ductility indicating an overload of each wire as the wires
broke.

Q By the way, Mr. Silkiss, did these loops have any surface rust?

A Superficial, yes.

Q The surface rust, did that, from an engineering standpoint, from a stress standpoint, did that have any significance as far as the failure of these loops were concerned?

A In my opinion, no.

Q At the point of the fracture, and immediately prior to the point of the fracture, was there any difference in the diameter of the wire when you examined it --

A Yes, of course.

Q Is there a name for that?

A Yes. Well, this is the necking down, or deformation that immediately precedes fracture of the wire as it is deformed under the load that is applied.

Q What causes the necking of the wire?

A As the wire is being stretched under load it elongates and ultimately it reaches what we call a -- it's a stress concentration for whatever reason as it reaches the limit of its ductility and it starts to neck down very quickly and break.

Q Is the fact that it necks down an indication that the fracture was not a brittle fracture?

A That's correct.

Q And that it was due to a defect or inherent defect in the metal?

MR. LYSAGHT: I object to that, your honor, as leading and suggestive. Also we have the fact that these objects were burned off by an iron worker.

THE COURT: Just a moment. I didn't get your first objection. What?

MR. LYSAGHT: It's leading and suggestive, your Honor.

THE COURT: Well, he is an expert witness. We can have leading questions with an expert of this type.

Overruled.

What is the second objection?

MR. LYSAGHT: I will withdraw it, your Honor.

A Well, it would indicate there would be no localized defect, that the material failed because of being loaded beyond its strength carrying capability.

Q Based upon all your tests -- I am going to ask you this, I know you answered it, but I am going to put it in a different form:

Based on all your tests and your findings, do you have an opinion with a reasonable degree of engineering certainty as to what caused the failure of these loops?

A Yes.

Q What is your opinion, Mr. Silkiss?

MR. LYSAGHT: Objection, your Honor. Insufficient foundation laid to render an opinion.

THE COURT: Overruled.

MR. LYSAGHT: I respectfully except.

A That the loops had been loaded to beyond their strength carrying capabilities.

Q Did you make any calculations, or make any figures of the load strength of these cables?

A Yes, I did.

Q Instead of talking about individual cables I want to talk about loops.

A Yes.

Q Do you understand? Instead of talking about the --

A One leg of the loop. The entire loop.

Q Exactly. So talking about the load bearing capacity of one loop which would contain the three cables, can you tell us the load bearing capacity of each individual loop?

A Yes. Each individual loop I calculated based on the geometry of the loop as I had received it and the strength of the material as derived from the individual wire tests and the minimum strength requirement of the material for the specification that it was to have been made to, I calculated that would be 75,000 pounds per loop load carrying capability.

Q 75,000 pounds per loop; is that correct?

A Yes.

Q When you say 75,000 pounds, I want to be clear --

A I am sorry. You asked me to state it in a way other than I have it. Let me just --

Q I know that you did it by individual cable; right?

A No. By individual -- each leg of the loop.

Q I see.

Well, will you take a moment just to add it up and make your calculation?

A Yes. 75,000. That's right. Per loop. That was the load -- I'm sorry, state your question again.

Q I was asking about the load-bearing capacity of each loop, the entire loop.

A All right.

Not the conditions under which it was loaded, but the conditions that it should have been able to carry.

Q That's correct.

A Okay. 206,000 pounds.

THE COURT: 206,000 pounds for each loop?

THE WITNESS: For each loop.

Q Can you tell us how you, very briefly, how you arrived at that? Because there have been some different figures given here.

A A 7/16-inch strand of this type of wire should carry 31,000 pounds. There were two such strands. That would add up to 62,000 pounds. A half-inch strand would have a minimum load carrying capability of 41,300 pounds. Add that to the 62,000 pounds, gives you 103,300 pounds.

But now it's a loop, so both ends of that loop are carrying the load, so we double that and it would be 206,600 pounds.

Q Then would it be fair to say, Mr. Silkiss, or, accurate to say engineeringly accurate to say, that if we assume that the girder that these loops had been part of weighed 130 tons that just two loops of the kind that you examined, one on each end, was sufficient to carry the 130 tons?

A Yes.

Q Do factors such as the height of the respective loops -- let me ask one at a time.

Does a factor such as the height of the respective lops and the lifting device used have an effect upon the ultimate stress that these loops could take?

A It's conceivable that it would.

Q Could the fact whether the loops are perfectly straight, or if they are bent in any way place some part in the maximum amount of stress they could take?

A It does.

Q So that when you gave us these figures and we talk about for example a safety factor, is that under the ideal conditions?

A The figures I gave you were on a straight up and down pole on the loops.

Q And if the lift is not perfectly straight up and down, or the weight is not perfectly distributed, it would vary?

A That's correct.

Q Mr. Silkiss, included in your report is a diagram of a lifting apparatus.

Is that your diagram? Or was that provided to you?

A No, that was provided to me.

Q The accuracy of this diagram, did that play any part in your metallurgical examination of this material?

A No.

Q Did it play any part in your determining the stresses that this material could be subjected to?

A No.

Q Did it play any part in your conclusion as an expert, your opinion as an expert as to the nature of the failure of these loops?

A No.

MR. GREEN: I have no further questions.

MR. LYSAGHT: With your Honor's permission, may I look at Mr. Silkiss' report? It may take a little while.

THE COURT: You have not previously looked at it?

MR. LYSAGHT: No, ma'am. Never have seen it, nor have I heard of this gentleman before.

THE COURT: He is not listed as a witness?

MR. FISH: No.

THE COURT: Pardon me?

MR. FISH: No, your Honor.

MR. LYSAGHT: No, your Honor.

THE COURT: Well, I have never heard of a trial being conducted like this before myself. We call witnesses, expert witnesses unknown to the parties and they have never seen his report and the witness is not listed.

MR. LYSAGHT: Your Honor can appreciate my plight.

MR. FISH: Again, your Honor, I --

THE COURT: What do you say, Mr. Geen?

MR. GEEN: Yes, your Honor?

THE COURT: What do you say? The fact that this witness was not previously listed in any pretrial memoranda.

MR. GEEN: Well, the fact that the third party defendant Bayshore would call an expert witness was listed in the pretrial memorandum. The engineer who testified as an expert was not listed, although it was said that they would call an expert. No one identified their experts, and I may say, and I don't think that Mr. Lysaght will disagree, but I told Mr. Lysaght that I was calling an expert and a metallurgist.

MR. LYSAGHT: He told me he was calling an expert metallurgist, your Honor, and by the way, forgive me for inconveniencing the Court, but I had no objection to any inconvenience that Mr. Geen might have encountered.

THE COURT: Well, obviously the rules contemplate that we don't have trials conducted in this manner where witnesses are called, particularly the expert witnesses who make reports, and the opposing party is not aware of the identity of the witness or his report until the trial.

What happens, what you are requesting now, Mr. Lysaght, is that the Court adjourn while you study an expert's report which could take a week.

MR. LYSAGHT: All right, then, your Honor, for the convenience of the Court I will withdraw my application.

THE COURT: Well, we will recess now until 2 o'clock for lunch. But please don't let it happen again not in any case you try before me, anyway.

(Luncheon recess.)

AFTERNOON SESSION

(2.20 p.m.)

EMANUEL SILKISS, resumed.

MR. GEEN: Your Honor, during the recess I showed Mr. Fish the report of Mr. Koppinger because that was left open, and he has informed me that after reading the report he does not wish to question Mr. Koppinger any further.

Also during the luncheon recess we brought from another office the cables that were --

THE COURT: In question?

MR. GEEN: (Continuing) In question, yes.

THE COURT: All right.

MR. GEEN: And I ask the Court, Mr. Fish just finished reading this, I ask the Court if I can let Mr. Koppinger go.

THE COURT: Yes.

You are excused, Mr. Koppinger.

MR. GEEN: Thank you.

MR. LYSAGHT: With your Honor's permission.

THE COURT: You may proceed.

CROSS EXAMINATION

BY MR. LYSAGHT:

Q Mr. Silkiss, just so I understand, you stated on your examination and on page 2 of your report that the sheet from each loop was removed and one strand from each loop was arbitrarily selected for diameter measurements.

Sir, for my own information we have three cables here each containing seven wires. You mean that you took one wire?

A We took one strand.

Q One strand. In other words, that would be one strand consisting of seven wires?

A Right. You see that on page 3.

Q Yes, sir. And did you make a chemical analysis of the one strand of the seven wires?

A I will check. Yes.

Q Am I correct in understanding that your analysis, that is your --

A We made a chemical analysis of one of the wires from one of the strands that we made diameter measurements on. There were two loops in question.

Q So I understand, sir, we have three strands each consisting of seven wires which would give us 21 wires; is that correct?

A Correct.

Q Did you measure the diameter of all 21 wires?

A No.

Q How many wires did you measure the diameter of?

A We took one strand from each loop arbitrarily designated, one is a tube from loop A, the other as B-2 from loop B. Then we measured the wires of that strand.

Q The 21 wires?

A The seven wires.

Q Seven wires. Of one particular strand.

A In each loop. So that's two loops, so we measured one strand from each loop.

Q When you say each loop you mean two lifting loops, the two objects that were submitted to you?

A Yes.

Q So you measured seven wires in one loop and seven wires in the other?

A Right.

Q Meaning you did not measure 14 wires in one loop and 14 wires in the other; is that correct, sir?

A That is correct.

Q With reference to your chemical analysis, did you perform that chemical analysis on the 21 wires in each loop, or each cable?

A No.

Q How many wires did you perform a chemical analysis on?

A At this moment I can't be sure, but we took at least one wire from the wires that we measured the diameter of, the strand.

Q So that of the 21 wires in one strand you examined one wire chemically?

A Correct.

Q And of the 21 wires in the other strand, did you examine --

A Of the loop, you mean.

Q On the other loop, sir, right, did you examine just one wire chemically there too?

A That's right, at least one if not more, but at least one.

Q Now, sir, on page 4 of your report you stated that examination of the wire surfaces at and adjacent to the fractures failed to reveal the presence of any secondary cracks, gross inclusions, laps or other defects.

A Right.

Q How many wires were you referring to there?

A From each of the strands that we selected we examined the center wire break and four of the outer wires.

Q How many, sir?

A The center wire.

Q That would be one wire out of --

A In the center, and four outer wires.

Q That would be just the center individual wire?

A Each strand is composed of seven wires.

Q Yes, sir.

A Six wires about a center wire.

Q Right.

A We examined the break in the center wire.

Q All three center wires?

A Just the strands that we made the measurements on.

Q So in other words, were there in one loop, were there two center wires that you did not examine?

A That is correct.

Q And on the other loop there were two center wires that you did not examine?

A That's correct.

Q Now, sir, what is a secondary crack in a steel wire?

A Well, when you have a fracture sometimes in some instances you might cracks elsewhere along the length of the wire.

Q Would that indicate an inherent defect in the wire before the fracture occurred?

A It can indicate a number of different kinds of things.

Q But could it indicate an inherent defect in the wire before the fracture occurred?

A Not necessarily. It could possibly.

Q It could. All right.

Now, gross inclusions, what are they, sir?

A Non-metallics from the steel manufacturing process. Metal oxides, refractory from furnace.

Q And you found no --

A In essence, dirt.

Q I see. In other words, you have to make a chemical analysis to ascertain if there were any gross inclusions or dirt in the wire?

A Not a chemical analysis. No, this is done metallographically.

Q How many wires did you examine to arrive at that conclusion?

A Five wires from each loop.

Q So that it would be five wires from loop A leaving 16 wires unexamined, and five wires on loop B leaving 16 wires unexamined in that --

A Yes.

Q And gross inclusions, or dirt, can cause weakness in steel wire, can it not?

A That's right.

Q Are those things brought in in the manufacturing process?

A Yes.

Q Now, sir, a gross inclusion can reduce the tensile strength of a wire, can it not?

A Yes.

Q And cause it to break unexpectedly?

A Yes.

Q You also said that you found in the wire that you examined no lapse or other defects. How many, of the 21 and 21, 42 wires, how many wires were you referring to there?

A The same five wires from each loop.

Q Now, sir, you did say that you found pitting; is that correct?

A Some superficial pitting, yes.

Q Where did you find that pitting? On all 42 wires that you examined?

A Well, visually you can see that there is -- there was some light rusting on the surface.

Q Of how many wires, sir?

A I would say generally all of them.

THE COURT: Is that what you mean by pitting?

THE WITNESS: Well, you have to realize that rust comes from the steel. It's an iron compound.

THE COURT: Is a slight rusting the same as pitting?

THE WITNESS: Well, as the steel wastes away locally you are going to have an absence of metal, you are going to have the rust replacing the metal. So you form a slight depression in the steel surface.

THE COURT: And you find this on the wire that you examined?

THE WITNESS: Anything that rusts superficially will show this.

THE COURT: The question is, did you find that on the wires you examined?

THE WITNESS: Yes.

BY MR. LYSAGHT:

Q All 42 wires, sir?

A I didn't examine all 42 wires metallographically.

Q Can rusting or pitting or corrosion reduce the diameter of a wire?

A Yes.

Q And can that consequently reduce the strength of the wire?

A Yes.

Q And can it reduce the tensile strength of the wire?

A Same thing.

Q And cause it to break unexpectedly; is that correct?

A Right.

Q In other words, if it were designed to carry a load of, say, a hundred ton, rusting or pitting, or corrosion could cause the wire to break at, say, 50 or 75 tons; is that right?

A If a wire were halfway corroded through, yes.

Q Was the diameter of any of the individual wires that you examined reduced by this pitting or corrosion that you found in any degree?

A In any degree? It would have to be.

Q How many wires did you find with the diameter decreased?

A We found, we measured wire diameters, as you see it here in the table, and they were all within the specification.

Q Forgive me, Mr. Silkiss, of the 42 wires that composed the two loops, how many wires did you find with the diameters redduced?

MR. LYSAGHT: Withdrawn.

Q Of the 42 wires comprising the two loops how many wires did you examine totally to ascertain if their diameter had been reduced by the pitting or corrosion?

A Of the 42 wires we selected, seven times three is 21, 42 wires -- total number of wires comprising both loops we selected one strand from each loop as being representative of the condition that was existing.

Q So that would be seven wires in one --

A We took one strand from each loop representative of the condition. We took one half-inch diameter strand and a 7/16-inch diameter strand, so we would have both sizes represented. Then we made measurements of all the wires in that strand, that is a representative condition, and we found that all of those wires were within specification as to the ASTM Specification 416 controlling wire size.

Q But you see, that doesn't answer my question.

A I'm just telling you, I don't know how much it might have been reduced because I don't know what it was started with.

Q Well, of the 42 wires could you tell me how many you measured to find out if their diameter was reduced?

A We measured, I just told you, seven wires in one loop and seven wires in the other loop.

Q Did you find the diameter --

A The wire diameters were within specification.

Q Did you find the diameter of any of them reduced?

THE COURT: He has just told us three times they were in specification.

Q Now, sir, can the composition of steel in the manufacturing process cause a wire to be weakened?

A Composition?

Q Yes.

A Yes.

Q If you add too much carbon can that reduce the tensile strength?

A It depends on what you are adding it to. I mean, in what kind of alloy you are dealing with.

Q Were these considered high carbon steel wires?

A Yes.

Q Can carbon reduce the tensile strength of wire if you add too much?

A In this particular case you are adding carbon, it would increase the strength.

Q Did you measure the hardness of the particular wires?

A Yes.

Q How many wires of the 42 did you measure the hardness of?

A Out of each of the strands arbitrarily selected one strand from each group we measured the hardness of every wire.

Q How many wires would that be?

A Seven wires in one strand, seven wires in the other strand.

Q Did you find that the hardness varied in each, in any of them?

A Not in an unreasonable manner.

Q Did you find any variation, sir?

A You would have to find it, sir.

Q The fact is, you did find it?

A That's the nature of the test. The sensitivity of the test.

Q But did you find the variation in hardness of the wires that you examined?

A Not what I would consider a variation. In the sense that I presume you are asking.

Q Well, did you state that the hardness, and I am referring to page 3 about the second paragraph from the bottom, sir, of your report, indicated that they had a hardness ranging from Rockwell C46.15 to 49?

A Right.

Q You did not consider that a differentiation?

A Not in this instance. We were dealing with wires of different size, different manufacture. The controlling aspect is the tensile strenth of the material.

Q In other words, sir, the individual wires within the loop may have been manufactured in different places or at diffrent times?

A No, they are different diameters. The center wire's a larger diameter than the outer wire, and there's different degrees of reduction, they are made slightly differently to get the different diameters.

Q Now, sir, I think you stated that you based your computations upon the assumption that a uniform weight was being applied; is that correct? In other words, an even distribution of weight?

A Yes.

Q Did you state, sir, on page 4 of your report, second paragraph from the bottom entitled "Low calculation calculations based on the specification minimum strengths of the strands comprising the loops and compared with the calculated load in each loop indicates that the loops theoretically should have been capable of sustaining the deadweight load of the prefabricated concrete beam being listed."

You made that statement, is that right?

A That's right.

Q Now, is there a difference between what a thing can theoretically sustain and what it can sustain in fact?

A Yes. I made calculations, I didn't test these particular loops.

MR. GEEN: Excuse me. I didn't want to interfere with the cross-examination, but if you read any further, he made assumptions.

MR. LYSAGHT: I intend to.

THE COURT: He made what?

MR. GEEN: He made certain assumptions.

THE COURT: All right. He said he is getting to that.

Q In other words, sir, did I understand you to say you didn't test the tensile strength of each --

A I'm calculating backwards what I think this should have been able to carry. So that's theoretical.

Q That's theoretical. I see.

In other words, you also said the calculations were made assuming first the load to be uniformly distributed over the four lifting loops with the lifting loops at a 60-degree angle to the concrete beam and, second, assuming only one loop at each end carrying the total load;

is that correct, sir?

A Right.

Q Now, meaning this, are there different forms of tension applied to an object? For example, if I were to hold a line plumb, or vertical over an object to be raised, and raise it, that would be a vertical force on the wire; is that correct, sir?

A That's correct.

Q And if these four lifting loops were being raised uniformly, theoretically they should carry the load; is that correct?

A That's what I had stated to Mr. --

Q If the wire, the steel content in each wire were, assuming it to be in good shape, so to speak, is that correct, sir?

A Assuming that it met the specification requirements.

Q All right.

Now, if one of them cracks will not the vertical pressure on the others be shifted?

A That's correct.

Q And that would not come within the specifications, would it?

A No, it wouldn't.

Q And if a loop, one loop, we will say, was theoretically capable of sustaining 130-ton --

A By itself.

Q By itself being raised in a vertical position, if I shifted that at a different angle, would not -- is it not conceivable that a pressure less than 130-ton could cause that wire to snap?

A Will you restate your question?

THE COURT: Have the reporter read it.

(Question read.)

A You mean you are pulling off at an angle?

Q Yes.

A I just don't understand --

Q Right. If I were pulling off at an angle. If I suddenly shifted the pressure being applied from vertical lift to an angle.

A I would prefer it if you get down to the actual situation that you are referring to so I don't have to make any assumptions, or -- you know, I could -- is the wire shackled? You are not telling me these things, so I can't -- you have not given me the situation completely that you are hypothesizing.

Q Well, you made it quite clear, did you not, sir, that your calculations were based on the assumption that the load was uniformly distributed over the four lifting loops; is that correct?

A Right. That the -- here's this concrete beam, and the concrete beam wasn't heavier at one end as compared with the other end, with the uniformly distributed weight, and the four loops each carrying their own one-fourth of that load. There are four loops each carrying one-fourth of the load.

Q And if that weight was suddenly ununiformly distributed, or redistributed, what would be the effect?

A If we broke one loop.

Q Yes.

A Then of course the three remaining loops will have to try to carry the load.

Q But isn't it a fact that if you broke one loop you would no longer have a vertical lift? Isn't that correct?

46 A The position of the load, the center of gravity will cause a shifting of the load. But the three loops in turn would have to support that entire load, the three remaining looks.

Q Isn't there a thing called a sheer force?

A Sheer force?

Q Yes.

A Sure.

Q Can a sheer force cause something to break?

A I don't see how it relates to this particular instance here. I mean, where are --

Q Well, if I apply a force --

THE COURT: What is a sheer force, first of all?

Q Would you answer the question?

A Well, the tensile force, the way you are using it, is a straight pull. Sheer force is where there is a lateral displacement (indicating).

THE COURT: I see.

THE WITNESS: So it could fail two ways by lateral displacement, or --

THE COURT: I see.

Q Am I correct in assumingthat an object which can sustain a tensile force of, say, theoretically 130 ton could conceivably not sustain the weight of that object if the pull were in an angular position or applying sheer force?

A Well, no. Of necessity this hasn't anything to do with the sheer force.

Are you --

Q I'm talking about theoretically.

A You say if I have a loop --

Q That can sustain --

A (Continuing) Or a wire, or any structure as compared to direct tensile pull and putting a sheer force on it, sheer force would cause it to fail at a lower load, assuming it's a ductile material. But there is no sheer forces here.

MR. LYSAGHT: I move that that be stricken as not responsive, the latter portion of the answer.

THE COURT: All right.

Q Now, sir, you were asked to find the probable cause of the failure; is that correct?

A Yes.

Q Is that right?

A Yes.

Q And you made a report to the Liberty Mutual Insurance Company, did you not, sir?

A Yes.

Q And anywhere in that report is there any indication that there was a claim that this particular girder was being held down by blocks when the load was applied?

A No. In my report?

Q Yes.

A No.

Q As a matter of fact, you were given a history of what transpired, were you not, on page 1?

A Yes.

Q And the second paragraph down under introduction you were told that four loops, two at each end, had been embedded in the concrete when the section was cast; is that correct? And that these loops had been secured to a lifting beam and thence to a derrick crane for lifting in place; is that correct, sir?

A That is right.

Q You were then advised that one loop had failed first, followed by rupture of the adjcent loop at the same end; is that correct?

A That's correct.

Q Then with the load unsupported at one end failure of the two loops at the other end followed; is that what you were told?

A If I have it there, that's what -- yes.

Q Now, sir, in your report towards the rear is there an indication as to when these wire cables were submitted to the manufacturer?

MR. LASACHT: Withdrawn.

Q Is there an inspection certificate?

MR. CEEN: Tell me which one you are referring to.

MR. LYSAGHT: Yes, the inspection certificate is six pages counting back. From Suzuki Metal Company, Limited, do you see that?

THE WITNESS: Yes.

Q And the date of that inspection certificate is April 9, 1968; is that correct, sir?

A Yes.

Q If you turn toward the back about four pages is there a receipt stamped by Bayshore Concrete Products Corp. of Cape Charles, Virginia, showing a date received of, it looks like May 26, 1969.

A Yes, but that's from a different steel company.

Q Different steel company?

A I guess. One is Suzuki and the other says CFI.

Q In other words, the composition of these wires came from different companies?

A Well, the half-inch diameter strand from one company, as I see it, and the 7/16 diameter strand from another company.

Q Is there any indication in your report as to when they were delivered to Bayshore?

A Well, if it's on the report, I didn't make an examination to find out when.

Q Is there any indication as to how long these wire ropes or cables were in the possession of the manufacturer before they were delivered to Bayshore?

A I have to look and study it and see.

Q Would you, please?

MR. LYSAGHT: May I approach the witness, your Honor?

THE COURT: Yes.

A Inspected at the mill April 9, 1968.

Q Is it correct, sir, I am showing you a document, and does that indicate that at least one group of these wires was inspected at the mill on April 9th, 1968?

A Yes. That's the date of the inspection report, or inspection date.

Q I see. Would that indicate to you that the wire had already been fabricated?

A Yes.

Q Do you know how long that wire was in the hands of the manufacturer before it was transmitted to Bayshore?

A I have no idea. Whether he had it stocked, or he manufactured it beforehand in the months immediately preceding, or he may have had it for a year. I don't know.

Q I see.

Are you aware of when this wire was ultimately put into the concrete girder?

A No.

Q Have you ever seen steel cable wires weakened because of mishandling in the storage or maintenance?

A I haven't seen it personally.

Q But have you heard of it?

A If you say it's mishandled, then it's been damaged.

Q This exhibit I believe was handed to you, or delivered to you some time in August of 1970?

A Right.

Q Did you send a report to the insurance company soon thereafter?

A September 22.

Q Sir, the report that you have submitted here is dated, revised June 4, 1974; is that correct, sir?

A That's correct.

Q You revised this report only three days ago, Mr. Silkiss?

A Yes.

Q Do you have your unrevised report?

A Yes.

Q Who asked you to revise it, sir?

A Mr. Walsh.

MR. LYSAGHT: I have no further questions, your Honor.

THE COURT: Who is Mr. Walsh?

MR. GEEN: Mr. Walsh is an associate of Liberty Mutual Insurance Company.

THE COURT: Well, I don't know what that is saying, Mr. Lysaght.

What is that saying, that he has revised the report?

MR. LYSAGHT: I don't know, ma'am. It is dated June 4, 1974. Does the Court want to -- may I have it marked for identification, your Honor?

THE COURT: Do you have the unrevised report?

MR. LYSAGHT: Do we have it?

THE WITNESS: I have the page, the original page.

MR. GEEN: May I state something? There were two revisions. One a mathematical error was found in the calculation.

THE WITNESS: Which you have in your copy.

MR. GEEN: And I believe that has been penciled in.

MR. LYSAGHT: Yes, I saw it.

MR. GEEN: Number two, there was a paragraph which as I understand was speculative which was omitted, and that Mr. Silkiss has a copy with him of the unrevised report. I believe he said he did.

MR. LYSAGHT: With your Honor's permission, may I look at that?

THE COURT: I just didn't understand, what are you bringing that out for?

MR. LYSAGHT: I want to take a look at the unrevised report, your Honor.

THE COURT: All right.

You didn't say that, you just left it hanging as if the man had revised his report at somebody's suggestion without telling us what or why.

MR. LYSAGHT: I didn't mean to create that inference, if I did, your Honor.

THE COURT: All right.

BY MR. LYSAGHT:

Q Sir, this concluding paragraph in this report, is this what was revised (handing)?

A That's correct.

Q Would you read that paragraph, sir?

A "The possible causes for overloading leading to failure presupposing that only two loops were carrying the load because of the manner in which the

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lifting leg used on the job site, see sketch," which is in the report, at least this is the way I was so advised that this was the way it was being lifted,

"could not easily uniformly distribute the load
between adjacent loops are, lifting too rapidly and
thereby imposing an indeterminate additional dynamic
load or more probably the homemade design of three
47 strands not woven together in a proper multi-stranded
wire rope such that the load and the loops were not
distributed uniformly or properly among the strands."

Q Well, when you say the home -- the what?

THE COURT: The homemade.

Q Homemade, were you referring to the loops within --

A Well, this is --

Q The wires with in the loops?

A Yes.

MR. LYSAGHT: I have no further questions, your Honor.

THE COURT: I don't understand.

What does that mean, homemade.

THE WITNESS: Well, it's not a standard wire rope, you know, like you see. This is obviously -- it's not intended to be functioned as a wire rope in the sense that wire ropes are used on pulleys and cables and guide wires. This is pre-stranded -- I'm sorry, pre-stressed concrete -- I forget the terminology they use in 416, it's the kind of material that's intended for pre-stressed concrete, very high strength, and doesn't lend itself easily to weaving so they don't make a wire rope out of it. But they are not using it here as a wire rope, and I am speculating in here that if the three strands are not working together one strand may be carrying more of its share of the load than the others.

THE COURT: And that is the paragraph you were asked to revise?

THE WITNESS: Yes.

THE COURT: In what manner was it revised?

MR. LYSAGHT: I didn't see the paragraph at all. I think it was left out.

THE WITNESS: The paragraph was left out.

MR. LYSAGHT: For the record, ma'am, may we mark both of these as exhibits so your Honor can inspect them?

THE COURT: Well, I don't know what is going on here. You are saying that was left out?

MR. LYSAGHT: Yes, ma'am.

THE COURT: All right. Let it be marked.

MR. LYSAGHT: May we have the one he just read marked, ma'am?

THE COURT: Yes.

(Defendant and Third Party Plaintiffs' Exhibit M was marked for identification.)

xx MR. LYSAGHT: Oh, I am sorry, your Honor, that exhibit is in evidence, is it not?

THE COURT: Yes.

MR. FISH: No, it is marked for identification.

MR. LYSAGHT: Then with the Court's permission may I offer it in evidence?

THE COURT: All right.

Is there any objection?

MR. FISH: No objection.

MR. GEEN: Has the main report been received in evidence?

MR. LYSAGHT: No.

MR. GREEN: Don't you want that, too?

MR. LYSAGHT: No.

THE COURT: Well, we have to have it for comparison.

What is the point of this?

MR. LYSAGHT: All right, your Honor.

May I at this time -- do you want to offer it in evidence?

MR. FISH: I will offer both the original report and the supplemental report.

THE COURT: All right.

MR. FISH: I mean, what I offer is the final report and the amended page showing the amendment.

MR. GEEN: There has been removed this morning by me that picture which was part and was already marked Exhibit XXIII.

Can we mark the entire Exhibit XXIII now, your Honor.

THE COURT: Yes.

(Report marked Defendant Bay Shore Exhibit XXIII in evidence.)

:x

MR. FISH: This has additional material, your Honor, on which we have had no testimony. I will withdraw the offer because there is a good deal of additional material which I am sure all parties will concede is erroneous as to sketches.

MR. GEEN: If you recall, I asked the witness this morning because the diagram is erroneous, I asked him whether any of the things he testified to were provided to him by somebody else, and he said they were not. However he was making an assumption on this diagram for the last paragraph, you see, the lifting loops are different here --

not the lifting loops, he had a pin going through both the loops, and it was a completely different arrangement.

MR. FISH: Right.

MR. GEEN: You understand.

MR. FISH: Well, I think that that is too confusing. I will withdraw the offer of both the original and the amendment, your Honor.

THE COURT: All right.

Well, what do we have now?

MR. FISH: Nothing on that report, merely the witness' examination.

THE COURT: Mr. Lysaght, do you want the last paragraph of his final report in with this unrevised paragraph?

MR. LYSAGHT: Yes, your Honor.

THE COURT: All right. Let's take that out of the report then.

MR. LYSAGHT: I'm offering into evidence the unrevised last paragraph of his original report.

THE COURT: We don't have the revised to compare it with.

Do you want that in?

MR. LYSAGHT: I will offer the revised paragraph so that there can be a comparison, your Honor.

MR. GEEN: As I explained, your Honor, there are diagrams in there, and I offer the whole report so you can understand the revision.

THE COURT: You say it is related to that, the rest of the report is related to the revision?

MR. GEEN: The one paragraph we are talking about. The revision is related to diagrams that were provided to Mr. Silkiss and which turn out not to be accurate diagrams.

May I show the Court?

MR. LYSAGHT: Your Honor, I would prefer to have both go into evidence.

THE COURT: The whole report?

MR. LYSAGHT: That's all right with me.

MR. FISH: All right, if you want it. I won't object.

THE COURT: All right.

MR. FISH: It's been offered then as Exhibit 23, your Honor.

MR. LYSAGHT: With your Honor's permission, could he tell your Honor what is bothering him?

THE COURT: Who?

MR. LYSAGHT: Mr. Fish.

THE COURT: Do you have some objection then?

MR. FISH: Well, if your Honor please, I think Mr. Geen has explained it, that the original report contains some diagrams on which he made some assumptions, and it is conceded that these diagrams are not correct.

THE COURT: All right. I am looking for a number. That would be the diagrams following page 14. There are two pages of diagrams. It is conceded that those are not correct diagrams.

All right. Now, is that the final report?

MR. FISH: This is the final report, your Honor.

THE COURT: All right. Let that be received.

(Plaintiff and Third Party Defendant's Exhibit XXIV was received in evidence.)

xx

THE COURT: All right, let's go on.

CROSS EXAMINATION

BY MR. FISH:

Q Mr. Silkiss, as I understand your testimony and remarks in your report it is your opinion that if you have a beam which is suspended by four loops in such manner that there is an even distribution of load between each of the loops, and if for some reason one of those part that may throw an extra load on the next one which may part, and that, in turn, may cause the other two to part; is that correct?

A Essentially.

Q That is what you call a domino effect, isn't it? You said before dominoes, push the first one over, then the rest of them go?

A All right.

Q I further understand that your testimony is that if you put a weight of 206,800 pounds on one of these loops the loop might break, that is the breaking point.

A That would be based on the material specification minimum strength.

Q That was your computation, wasn't it, that it would break at 206,000 --

A No, that would be the minimum strength. The material is made to specification, the manufacturer guarantees that it will have at least that strength or better.

Q That amounts to 86 tons. As I compute it. Would you agree with that figure?

A Do you want me to calculate it?

Q Yes, please.

A What was the number? 206?

Q 206,600. I divided that by 24, taking off --

A You are using long tons now.

Q Long tons.

A If you want to use long tons.

Q Steel is usually weighed in long tons, isn't it?

MR. GEEN: Excuse me, Mr. Fish. I don't know what a long ton is.

MR. FISH: 2240 pounds.

MR. GEEN: As compared to?

MR. FISH: 2000 pounds.

Q Steel is weighed in long tons, isn't it? Customarily?

A Well, there is so much confusion on that subject I always verify as to what was actually done.

Q Well, we will talk about long tons, then.

A Well, if you are talking long tons --

Q Do you know what the weight of that girder was in tons?

A I was told 130 tons and I figured that as 160,000 pounds.

Q Did you calculate that at short tons or long tons?

A At 2000 pounds per ton.

Q That is a short ton.

A Short ton. It's a concrete girder, it's not steel.

48 Q In any event, if you had long tons you would have 86 tons, and if you had short tons it would be more, I would

assume that would be about 103 tons; is that right?

A I'm lost. You tell me what the weight is.

Q 206,600 pounds is your calculation as to the breaking strength of this wire.

A Right. Of the loop. Of one loop.

Q Yes. That would include both ends of the loop?

A Yes, in a vertical pull.

Q Vertical pull. Would you recommend to any person who is actually using this wire in a loop form that he would use it to lift 206,800 pounds?

A It depends on the application.

Q Well, for hoisting.

A Ordinarily not.

Q You have to have a safety factor in there, don't you?

THE COURT: Excuse me just a moment.

A You were saying in design, if an engineer were designing he provides a safety factor.

Q He would not use that wire loop intentionally to lift 206,000 pounds.

MR. GEEN: Excuse me. I'm not sure I understand the question, the assumption. The witness hasn't testified that there wasn't a safety factor.

Are you asking about one loop for the entire girder?

MR. FISH: I'm asking about one loop.

Q There would be a safety factor designed in there, wouldn't there?

A If one loop has a minimum breaking strength of, what did we say, 206,600 pounds, minimum breaking strength, this is theoretically based on what the material is supposedly capable of and the designer in lifting and depending on his lifting application would work to that safety -- to that strength margin depending on the application, or would design in a safety factor.

Q Isn't it customary to design in a safety factor ll commercial applications?

A Generahly I would say yes, but there are circumstances here where it might not be.

Q Do you know what safety factors are customarily used in commercial applications?

A It depends and varies with the application in the industry.

Q You have a safe working load; isn't that what the manufacturer calls it?

A Well, this is implicit of the safety factor.

Q Yes. That is the result of application of the safety factor?

A Right.

Q And the manufacturer very frequently has tables showing breaking strength and safe working load?

A Yes, depending on the product.

Q And in a wire rope that can run anywhere from 2-1/2 up to 5, that safety factor, can't it?

A Depending on the manufacturer and application, what he is selling the wire rope for.

Q You don't know what safety factor --

A This is not wire rope.

Q Well, what is it?

A Strand. Pre-stressed concrete -- strand for pre-stressed concrete.

Q You wouldn't call that wire rope (handing)?

A No.

Q A layman would think of it as wire rope, wouldn't he?

A A layman calls it a cable, and are you talking about telephone cables, or --

MR. FISH: That is all I have, your Honor.

THE COURT: All right.

Is there anything further of this witness?

MR. GEEN: No, your Honor.

MR. LYSAGHT: No, your Honor.

THE COURT: Thank you.

You may come down.

(Witness excused.)

THE COURT: Do you have another witness?

MR. GEEN: Yes, your Honor.

THE COURT: All right.

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CLIFFORD THIBODEAUX, called as a witness by the defendant Bayshore, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GEEN:

Q Mr. Thibodeaux, at what location are you employed?

A I am presently working in Bayshore Concrete Products, and it is located in Cape Charles, Virginia.

Q Who pays your salary?

A I'm paid by Raymond International because I'm working at Bayshore because Bayshore is owned by Tidewater, Raymond and Kiewit.

I was sent there in 1961 to do a special job, and I have been there ever since.

Q So you are working at the Bayshore plant on the payroll of Raymond International?

A Raymond International.

Q Was that true of the time that we are talking about the manufacture of these concrete girders and the contract between Bayshore and Kiewit-Slattery?

A Yes.

Q Can you tell us what job you performed, if any, in relation to these concrete girders?

A My prime job at Bayshore is primarily production manager, to see that the scheduling, the product, the loading and et cetera --

Q You mentioned the loading. Were you in charge of the loading of the girders in question here?

A I would say in a kind of a roundabout way I am responsible, put it that way, and I have to make a visual inspection of all loading, or barges that we ship. I have to put my final approval before it leaves the yard.

Q Was to your knowledge any representative of Kiewit who was there and had any relationship to the loading of these girders?

A At the beginning of the job Kiewit had a young fellow down there, and I say young fellow, I'm not too sure of his age, but I would say 35, 36 years old. A guy by the name of Don Phillips who was an engineer for Kiewit who at that time was working in Norfolk, Virginia, which is across the bay from where we are. And was spending quite a bit of his time at Bayshore, and when the job finished up in Norfolk he then came over to Bayshore and stayed there until everything was finally organized, the production, the shop drawings, the shipping, scheduling of the barges and et cetera. This was primarily handled by him.

Q Was there any other firm acting and accepting the goods at Cape Charles?

A Well, there was two other people involved, Raymond was involved because Raymond had their people --

Q I don't think anybody is going to object to my asking this question:

Was United States Salvage --

A I was going to get to that.

U. S. Salvage was employed by me and by the owner, that is Kiewit-Slattery, to inspect each and every barge before it went out.

In other words, after I got that barge loaded, when I say "I" me and my people got the barge loaded and secured for shipping, then U. S. Salvage came in and made the final inspection, and anything that they didn't approve of we had to make it right.

MR. LYSAGHT: I move that everything that they didn't approve of we had to make it right be stricken, your

Honor. It is too general.

Is he talking about the integrity of the girder, or the --

THE COURT: Would you read that answer?

(Answer read.)

THE COURT: What are you objecting to?

MR. LYSAGHT: Well, ma'am, I don't know what he is referring to, your Honor, when he says everything that they didn't approve of. Is he is talking about the tie-down, the number of girders on the barg?

THE COURT: Well, you can always cross-examine him about it and ask him on cross-examination.

BY MR. GEEN:

Q Mr. Thibodeaux, can you tell us how the barges were loaded? Let me pinpoint what I want you to direct yourself to.

I am talking now initially about the handling of the concrete girders. Where they were fabricated, if they were lifted, how, if they were lifted how they were lifted, on how many occasions and how they got from the place where they were fabricated into the barge.

Could you direct yourself to that, please?

A First we have what we call forms --

THE COURT: Where were they fabricated?

THE WITNESS: In the yard at Bayshore.

THE COURT: I see. All right.

A (Continuing) And we had our forms where we test the girders, and then they were post-tentioned. They were taken from that particular area and put into storage, and of course they were finally dressed up and rubbed and et cetera.

At a later date --

Q Did you say taken from that area?

A Well, from the casting area and put into storage.

Q How is that done?

A We transport those by means of a lifting device which -- I have a hook and et cetera to try to show --

Q All I want to know is at this time embedded in the concrete are there these lifting loops?

A We had two lifting loops on each end.

Q When you transported it after it is formed in its form to the storage area, are those lifting loops used to transport it?

49 A Those lifting loops were used to transport it. We had a, what we call an equalizer hook, and this particular hook was used one on one end and one on the other end. With the means of a hydraulic, what we call a dolly, it

had a hydraulic cylinder with huge tires that straddle the end of the beam, and then it was taped up with a hook like this (indicating).

MR. GEEN: I have to identify this.

Q I ask you to look at this. Is this a model of one of the equalizers that was used in your plant?

A This is one of the models that we made, and this is a scaled down model of what we actually used.

THE COURT: It's a lift, is that what you are talking about? That is what he used to lift these?

THE WITNESS: Yes.

MR. GEEN: Yes, your Honor.

THE WITNESS: We had a cable that came from here with a shackle, and it went up to a hydraulic cylinder approximately four feet above this. And these loops, this was open, it had a handle on this side, and the fellows would hook that on to each loop and the distance from one look to the other was about 10-1/2 inches from center to center (indicating).

This, of course, rests in here and each loop is bearing on each side which there was a circle of approximately nine inches and which gave us a direct vertical pull (indicating).

Then we take this, and then transport the whole thing into the field which we call the field, and then it was stored.

THE COURT: All right.

BY MR. GEEN:

Q Did it go up and down?

A This equalizer, when you go through rough terrain that the girders just swing and go right on through.

Q And the loops are always resting -- always resting. Supported from here, and it could just work up and down like this and still carry the same load on each cable at all times (indicating).

MR. GEEN: Shall we mark this in evidence, your Honor?

THE COURT: All right.

Let me ask you this: It is your claim that they didn't use the proper lifting equipment?

MR. GEEN: It is my claim that they used a different type of lifting equipment and that it imposed -- I am not saying this is the total reason of the failure, but I am pointing out that it imposed a different stress and greater stress than the use of this type of equalizer, and I am going to develop that as to the advice that they received from Mr. Thibodeaux prior to the lifting.

THE COURT: All right.

MR. LYSAGHT: Your Honor, I would respectfully object to this as immaterial, and it goes outside the scope of their contentions. They seem to be going all over the lot. They initially claimed that there were additional pressures applied to this particular girder because of an alleged failure to knock out the blocking. Now they are shifting over to some type of equalizer.

THE COURT: Well, their claim is very broad, and that is that the proximate cause of the occurrence was the improper handling of the concrete girder and the negligence of the plaintiffs and third party plaintiff.

All right.

What is that exhibit number?

MR. Roman numeral 25, your Honor.

(Defendant Bayshore Exhibit XXV was marked for identification.)

xx BY MR. GEEN:

Q Mr. Thibodeaux, you mentioned a gentleman, I'm not sure I remember the name, Don Nelson?

A Don Phillips.

Q Don Phillips, I'm sorry.

Prior to the fabrication, or, during the fabrication was the method of handling these concrete girders, Bayshore's method of handling them and how they should be handled discussed with Kiewit?

A Put it this way: It wasn't discussed with me personally. I would say this much, that Kiewit Slattery had a man there which was Don Phillips, Raymond had a man down there to make a survey of our lifting loops which they in turn asked us to weigh some of the girders, which we did for them. This was based on their building their picking device for picking these T's.

MR. FISH: If your Honor please, the term Raymond is getting to be used rather indiscriminately. We have one company by the name of Raymond that operated the salvage, the dredge operation, the derrick.

THE COURT: That is the plaintiff here.

MR. GEEN: That is the same company.

MR. FISH: Same company?

MR. GEEN: Same company, oh yes.

THE WITNESS: Same company.

THE COURT: All right.

MR. GEEN: As you recall, I believe the gentleman from Kiewit said that Raymond was hired, the engineering department of Raymond was hired for the design. Do you recall that?

MR. FISH: Yes.

Q This equalizer which has been marked for identification as Exhibit No. XXV, would it hold two loops?

A Yes, sir.

Q So that the lifting operation, would that employ two of these equalizers?

A One on either end of the beam.

Q All right.

Now, when the girder is lifted with these equalizers and the four loops on the girder is engaged, is the weight, is the total weight of the girder resting on those four loops?

A At all times.

MR. LYSAGHT: Objection, your Honor, unless a proper foundation is laid as to this gentleman's technical knowledge and his ability to answer that question. It calls for an opinion.

THE COURT: He is just giving us a statement of facts, is he not, as to what occurred in the place?

MR. GEEN: In the plant.

THE WITNESS: Yes, your Honor.

THE COURT: All right. Proceed. The question was whether the four loops were resting on two of those lifting devices; is that it?

MR. GEEN: Yes, your Honor.

THE COURT: All right.

A Yes, they were at all times.

Q And that time would there be anything else underneath the girder?

A No, no. Nothing underneath the girder.

Q Otherwise those four loops would be in the air?

A Picked up and carried --

Q I'm not going to take the time to take you through step by step, but can you tell us before the girder is lifted, actually put on to the barge, on how many different occasions each girder was lifted?

A The system that we had, we had to handle these girders at least two times before it got to the barge, minimum of two times. Sometimes we had to shift around because maybe we stood one where we couldn't get to the other one.

In other cases maybe it was handled more than two times. It was handled at least three times by the time it got on to the barge.

Q The girder, when they were on the barge they were secured in a fashion?

A They were secured according to the specification that was provided.

Q I show you Bayshore Exhibit XX marked for identification, still only marked for identification, and

I ask you if this is a drawing as to the manner in which the girders were secured (handing)?

A Yes, this is a typical sketch of the way they were secured.

MR. GEEN: I offer it into evidence.

MR. FISH: No objection.

THE COURT: What number is that?

MR. GEEN: It is Exhibit No. XX marked for identification, your Honor.

MR. LYSAGHT: No objection, your Honor.

(Defendant Bayshore Exhibit XX was received in evidence.)

xx BY MR. GEEN:

Q Mr. Thibodeaux, I want to get right down to the barge in question here. Already received in evidence as Bayshore Exhibit No. XXI is a diagram of the barge, or a front view of the barge in question with the five girders stowed on the barge and some indications as to which one was T-205, and the fact that two had been removed prior to the occurrence that we are involved in here.

Now, is that a fair and accurate profile of that barge?

A I would say yes. This is pretty much the way they were stored, two up and three down.

Q That is what I wanted to ask you about next. The fact that there were --

THE COURT: Now, I don't know why we should go into that. Is that disputed as to how they were stored? I don't understand that to --

MR. GEEN: Yes. This is very important.

Subject to connection, your Honor, you are going to see that it is very important.

THE COURT: They dispute that they were --

MR. GEEN: No, they don't dispute it, but I am going to point something out.

THE COURT: They dispute they were stored on the scow in the way that you suggest?

MR. LYSAGHT: I think they stored them, your Honor.

MR. GEEN: Excuse me. I have to lay a foundation. You see, I am now going to lead into the fact that there were some higher and some lower and that there was a different problem with the ones stored lower than higher, and until I develop this I can't get to that information.

50 MR. LYSAGHT: Now, your Honor, we are going over into storing. I still don't see the relevancy.

THE COURT: I don't want to bring out a lot of irrelevant facts here.

MR. GEEN: This is not irrelevant at all, your Honor.

THE COURT: You have to make an offer of proof. I'm not going to listen to how each one of these were stored when nobody disputes it.

MR. GEEN: I will make the following offer of proof:

The fact is that when this was loaded Mr. Thibodeaux was responsible for the blocks being inserted, and the blocks had to be inserted in a certain fashion, that is, you could not insert the blocks with the girders being fully resting at the base of the scow, resting there it's ultimately going to rest, because of the fact that on the girder it tapered and you could not, because of the height of these side --

THE COURT: Stanchions?

MR. GEEN: (Continuing) -- stanchions get that block of wood in if you lowered the girder right down to the base of the scow.

Now, this was true of the girders that were stored and were lower, and you had more room to work with on the girders that were stored in a higher fashion on the scow. And similarly you could not get those blocks out from the seat it was on unless the girder was first -- on these lower ones was first raised. That is the information that I was to develop.

THE COURT: All right. Say that again, you couldn't get the lower -- the blocks on the lower girders out without first --

MR. GEEN: The girder being raised at least a few inches.

THE COURT: On the lower girder?

MR. GEEN: Yes, ma'am.

THE COURT: I should have said you couldn't get the blocks out on the higher girder without the lower stanchion being raised?

MR. GEEN: No, without the girder itself. You could not on the lower girders, you could not get the blocks out without first raising the girder a few inches.

THE COURT: Well, all right.

MR. LYSAGHT: I object to that, your Honor. I think this is entirely irrelevant.

THE COURT: Well, this is something that Kiewit knew; is that what you are saying?

MR. GEEN: I don't know what Kiewit knew. I know they took over the ownership and title of this at Cape Charles and the unloading operation was their responsibility. Now there has been a serious question here up to this point as to whether those blocks were properly removed and whether that girder was freed for lifting, and I'm not going to review all the testimony. I think it is unnecessary. But I think this is very, very relevant because there has been no testimony that this girder was raised and they removed the blocks.

If you want to review the testimony, the mate said everything was clear but he didn't know if there was blocks or not and he didn't know anything about removal of the blocks.

The next man that testified, Mr. Comer, he testified that you unscrewed the bolt and the blocks fell free. And he denied at first that there were any nails, which I am going to be going into, and he certainly did not testify that they had to raise this girder first to get this block out.

So it certainly goes to the very heart of this case of whether this girder that failed had actually been freed prior to this attempted lift.

THE COURT: Well, it seems to me that the disputed issue of fact is as you suggest, whether these girders had actually been freed.

Now the plaintiff, or, the defendant Kiewit, I have forgotten which, have called two witnesses who have testified under oath that they were free.

Now it seems to me that the way that is met is by calling people who did the unscrewing and ask them what they did and whether they were in fact freed. Those people haven't been brought here. Those were the iron witnesses.

MR. GEEN: They are not my --

THE COURT: You are the one who has the burden now because they have testified, two people under oath, that they were free.

MR. GEEN: I suggest to your Honor that I do not have the burden, that the burden of proof never shifts to the defendant, and I suggest that the quality and the nature of the testimony --

THE COURT: Well, you have to meet it once the plaintiff has made a prima facie case, then I'm afraid the burden does shift whether you want to call it that or not, but the burden of going forward at least to disprove it. They have two people who testified under oath that everything was clear. They don't give the details of exactly how it was done because they didn't do it. Some iron workers did it.

But their testimony is that their responsibility was to see that it was clear and to give the signals. Now the rest of this, as far as I'm saying, is irrelevant. The issue is whether it was in fact clear.

MR. GEEN: Yes, and I am submitting circumstantial evidence --

THE COURT: That it couldn't have been clear; is that it?

MR. GEEN: That's right. That's right.

THE COURT: Because they had to do what?

MR. GEEN: They had to lift this girder first before they could remove that block.

MR. FISH: Then it was free if they were lifting it.

MR. GEEN: It would first be loosened and lifted a couple of inches before that block could be removed.

THE COURT: You mean they had to lift it tightened first?

MR. GEEN: It had to be loosened away and lifted a couple of inches before that block could be taken out.

THE COURT: Well, that's what Mr. Comer testified, as I recall, at one point.

MR. LYSAGHT: That's when it failed, your Honor.

MR. GEEN: No, he did not. He said ere was a token load put on of 20 tons, that's not going to lift a 130-ton concrete girder, and that just made the lines taut. Then he testified that they unloosened this bolt and these blocks were just fall away. He knew nothing about nailing or anything else. That's the testimony in this case.

MR. LYSAGHT: I object to that statement and I disagree, your Honor.

THE COURT: All right. Let's proceed then. You may proceed.

MR. LYSAGHT: May I have a voir dire on one thing, your Honor?

THE COURT: On what?

MR. LYSAGHT: Is your Honor overruling my objection?

THE COURT: I am letting him proceed.

MR. LYSAGHT: May I ask him one question, your Honor?

All right, if you feel it is going to delay the trial --

THE COURT: Well, what is the voir dire on? To see whether he can testify?

MR. LYSAGHT: I will withdraw it, your Honor.

THE COURT: All right.

MR. GEEN: I don't recall what the question was that was objected to.

THE COURT: You asked him how those girders were installed and the stanchions; is that it?

MR. GEEN: I frankly don't remember.

THE COURT: Well, let's start there, if will be simpler than having the reporter try to find it.

MR. GEEN: All right, your Honor.

BY MR. GEEN:

Q I was asking you about the difference in height on the scow, and the scow in question of the girders. Can you explain that to us, why it appears that some were higher and some lower?

A No. 1, when we loaded this barge we had --

MR. LYSAGHT: Your Honor, this of cour: is over my objection.

THE COURT: What objection?

MR. LYSAGHT: Well, I am objecting to this evidence, your Honor, on the ground there is no evidence that this is how this particular scow was loaded.

MR. GEEN: Mr. Lysaght, this one was in evidence already identified by Mr. Comer.

THE COURT: Yes. Overruled. Proceed.

A When we load these barges what we try to do is to load them in the same order that they would be unloaded.

Now, in order let's say to put -- we put this girder on here --

THE COURT: The middle one?

THE WITNESS: The middle one on first, we put this one on second, this one on third (indicating).

THE COURT: Call it out because Mr. Fish doesn't know when you say --

MR. FISH: I can see right through the paper, your Honor.

A And let's say this one would be No. 4 and this one would be No. 5 (indicating).

Now, in putting these girders on this barge we had no problem with these the way the barge was designed, we could set this girder in there and slip the blocks in on a special, which I have brought maybe to help clarify some of my explanation. I'm not very good at this, but I can show you better than I can --

Q Do you want the exhibit now?

A Yes.

THE COURT: Well, let him tell us, then he can go into it.

A In this particular one what we had to do with these lower ones, we had to bring the girder down and we had our frames after we get about halfway down put the

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frames in that would support these blocks (indicating).

Then we would come on down to maybe six or eight inches where it's resting on this soffit down here, and then we put the blocks in and then we would let the girder come all the way down which means you have to raise this girder up at least eight inches in order to get that block out of there.

Q Only on the lower ones you are referring to?

A On the lower ones. I'm talking about the lower ones. The high ones no problem, you could put the blocks in afterward, you can --

THE COURT: Why do the bottom blocks have to come out in order to --

THE WITNESS: Well, it would be a wedging effect. In other words, when you start pulling on this girder here (indicating), and this one is off and this one is off, then you start pulling on this one from this side and you start raising this up, you have a side effect in there and you are bearing up against this side (indicating).

Now, I visited the job site the following day --

Q Let's not get to that. We will get to that in a moment.

THE COURT: Well, I didn't understand where the block was. I thought it was put on the bottom as you said.

Was it put on the side at the bottom?

THE WITNESS: On the side. Over here (indicating).

Q Let me clear something up right now about that blocking on the bottom and the top.

There has been a diagram made by Mr. Comer and he indicated that there was blocking placed at the bottom of the girder between the upright and the girder.

I ask you, sir, if on any of these barges, this one in particular, any of them, the blocking was ever put at the bottom?

A We never had any blocking at the bottom. The only thing we have had is a piece of plywood that was bolted to the stanchions, and they were built so that it would taper down, it would automatically guide the beams coming into position. And that was to keep from damaging the concrete which was a high strength concrete, that was one reason, and there never was at no time as the sketch will show, there nev er was any blocking at the bottom at all. None whatsoever.

Q As a matter of fact --

A There's very little space in between that screw and that block. There's only about 3/8 of an inch of clearance.

Q Between the uprights at the bottom and the --

A At the bottom we only had maybe a half inch on each side, then between the block and the concrete we only had about 3/8 of an inch of clearance, very, very close in order to maintain the accuracy of the stability.

Q So I understand there was no blocking at any time at the bottom?

A No blocking at the bottom.

Q As a matter of fact, did you say half --

THE COURT: May I see that exhibit, please? Let me see if I understand this now. There are no blocks at the bottom as shown here.

THE WITNESS: There are no blocks.

THE COURT: There are only two blocks at the top; is that it?

THE WITNESS: One on each side of the top at each end.

THE COURT: And this was plywood.

THE WITNESS: On the side of the beam there was strip of plywood bolted to the steel beam to keep from damaging the beam as it went down into position.

THE COURT: I see, at a slight angle.

THE WITNESS: At a slight angle, that's right. And automatically gueis the beam as it went down, it guided it in a straight line.

THE COURT: Well, it appears that these blocks are drawn in after in pencil, or were they originally there?

THE WITNESS: Well, that's some of the field sketches that were made long before this ever happened, and we just made some more copies of them. I use those sketches in the field for loading, and we take those, I mean, write down which girders we are going to load on this barge and what order we are going to load them in, and this was the standard type of sketch we made for that purpose?

THE COURT: All right.

Now, I think you were going to proceed to tell us why you had to raise this lower one up in order to get something out.

THE WITNESS: In order to get the block out.

I can show you here. If you look at this taper right here, this chamfer strip we call it. In order to get this block out of there you would have to raise that beam up about six inches.

THE COURT: The girder or the beam?

THE WITNESS: Well, the girder. We call it a beam.

THE COURT: In order to get that out --

THE WITNESS: In order to get this block out of here you cannot pick this block up unless this beam is picked up high enough to get this block out.

Now, on each side there's a piece of flat bar welded to this piece of angle and there's a nail driven through that on either side.

Now, in order to get that block out of there, otherwise you would have to cut this piece of flat bar off there, pull the nail out and cut the piece of with a torch and then slide this piece out of there, that would be the only other way to come out of there.

THE COURT: I don't think I understand that. That block was put in there to wedge these pieces of plywood, isn't that so? To keep the girder --

THE WITNESS: If you will look at this right here, see this screw right here (indicating)? That screws in this way, and that screws in that way, and they have only got a very small gap between this and this (indicating). And you drop that in there before the beam come all the way down, then when it rests in its resting place one man gets on this side and one on this side (indicating).

THE COURT: And tightens it?

THE WITNESS: And tighten it up.

THE COURT: Why couldn't he just tighten it up, just screw that again?

THE WITNESS: This is what they are supposed to do, loosen this up, and then you have to be very careful in the picking, pick it up straight because if you pick it up on a slight angle you would be bearing against this side, and when you bear against this side you are bearing against the opposite side down here which would be down here (indicating). And as you come up you would have to keep that boom and keep that load as you pick the load up the barge starts coming up, and as the barge comes up you have to boom the rig up and keep a straight pull at all times. In order to keep this from wedging. This will create a wedging effect between this block and the bottom. This side will be clear.

THE COURT: I don't understand it.

THE WITNESS: Now, on the one that was up higher --

THE COURT: Let's go over this again. These blocks that I am pointing to you see right here (indicating)?

THE WITNESS: Yes.

THE COURT: You say that those are placed in there and then tightened and placed by screws on each end of these stanchions?

THE WITNESS: Right.

THE COURT: Made of plywood; is that it?

THE WITNESS: Well, the stanchions are made out of steel, the plywood is only a face piece that's put on, that's all it is. Just a piece bolted onto the steel stanchions. The only wood we have here is this block and this little strip of wood that's bolted onto this steel beam that has been cut and made like a T and made into a stanchion.

THE COURT: Then in order to get the girder out they have to unscrew these screws which were used to tighten the block in there; is that correct?

THE WITNESS: That's correct, yes.

THE COURT: All right. So far I am following you.

Now, once they unscrew those screws to release the block you say they can't do that?

THE WITNESS: Well, they can loosen the screw, but they cannot take the block out until they pick the girder up.

THE COURT: Why is that again?

THE WITNESS: Because they don't have enough clearance between here, between the top of the block and the bottom of this girder flange (indicating). There isn't enough space in there. So they would have to pick it up high enough, maybe this point here would have to be about this high in order to pick this up in order to get it out.

THE COURT: Because the screw won't come out far enough.

THE WITNESS: The screw stops right here, that's all. They have got that much threads right there. This can only move back just a very little bit. Then of course there's a piece welded on this end and on the opposite end, and there's a nail driven in that so the nail has to be pulled out, the screws has to be loosened, the girder has to be picked up and the block has to be removed.

THE COURT: In other words, the girder is still somewhat secure as they pick it up.

THE WITNESS: Yes. Oh, yes. And they did not boom the rig up as they are coming with it, it creates a binding, in other words, it would be dragging on this side and then at the bottom on this side, which is the top on this side and the bottom on this side. Because as it starts picking up the barge starts coming up automatically, take the weight off and automatically starts coming up, so if they don't keep the load in line with the beam, then they create a wedging effect which creates a side load which can cause a failure.

THE COURT: All right.

BY MR. GEEN:

Q Mr. Thibodeaux, was this barge loaded according to the specifications of U. S. Salvage?

MR. LYSAGHT: I will object to the form of that question, your Honor, and move that the answer be stricken. There is no foundation that this man has any personal knowledge as to any specifications. Nor is there any evidence of any specifications.

THE COURT: Well, I thought he was doing the loading and he testified that if it wasn't done according to U. S. Salvage specifications he had to change it. That is already in evidence.

MR. LYSAGHT: My understanding was that he and allegedly Kiewit hired U. S. Salvage.

All right.

THE COURT: I thought Kiewit hired U. S. Salvage; is that right?

THE WITNESS: That's correct, your Honor. Yes.

Q Would you answer that question?

A Would you repeat that question?

(Question read.)

A Yes.

Q You made a model of the holding devices for these girders: is that correct?

A That's correct.

Q And the stanchions that were on either side of the girder, were they made out of metal?

A This is made out of metal. This was a piece of beam here, and this was also a piece of beam and this represents a piece of plywood (indicating).

Q Now I want to ask yu about the condition -- when I say "the condition" I mean the integrity of all of the metal portions of the stanchion when it was loaded, was used, bent stanchion used or bent pins?

A Well, put it this way: We used these barges quite often. They have been in service for a couple of years, and just about every trip that the barge came back we would find that these little pieces here, which if you don't mind I'd like to just take this apart (indicating). This is the nail I have been talking about (indicating). In other words, we just made this where you can take it out with a fingernail, you know, this is the kind of nail that we are talking about. They were driven in there.

Now, this block here was automatically tied with what we call a lag bolt and this is a piece of steel here so that the screw would not damage the block so it wouldn't work itself in and cause any loosening in the trip.

Well, in most cases we have pictures to show that we find these pieces bent, an indication that we thought was happening that they were just letting the beam come down and bending these pieces down. The block was supposed to have been taken off, this was supposed to have been put in and clear everything up. In other words, this is supposed to have been taken all out. That's the way it was designed.

MR. LYSAGHT: I move that the answer be stricken as not responsive.

THE COURT: Pardon me?

MR. LYSAGHT: I move that the answer be stricken as not responsive and on what happened on other occasions immaterial and what seemed to them immaterial.

THE COURT: No, he is telling us how this works. Overruled. Now maybe you could explain to me with the model what you were telling me before as to why it had to be pulled up before the block could come out.

THE WITNESS: I think I can. I'm not going to put the nails in.

Now, this righthere represent --

MR. LYSAGHT: Your Honor, has this been marked for identification, or is it in evidence?

THE COURT: We can mark it for identification, yes. That will be Roman numeral XXVI?

MR. GEEN: Can we mark the both pieces, your Honor?

MR. LYSAGHT: What is it listed on the pretrial list of exhibits?

MR. GEEN: They weren't, they were brought up from Virginia.

MR. LYSAGHT: Your Honor, I object. There is no evidence that it's been identified previously as an exhibit.

THE COURT: Well, we have had a lot of exhibits in here that apparently nobody has seen previously.

MR. LYSAGHT: I further object, your Honor, in that obviously this is merely a working model prepared for litigation and does not constitute the conditions which existed on that scow on that date.

THE COURT: Overruled.

(Third Party Defendant Bayshore Exhibit XXVI was marked for identification.)

xx THE WITNESS: Your Honor, what I tried to do here, if you would look at this, that represents the two tallest ones, the two that's on top, and I couldn't make two so I made one. And there was enough room in here now normally instead of the blocking being here the blocking normally is back in here, which I think I can show you.

You see this web in here, this taper (indicating).

THE COURT: Yes.

MR. LYSAGHT: I beg your pardon, your Honor. Did he say that normally the blocking would be -- where?

THE COURT: In the back there.

MR. LYSAGHT: And when was the condition that he observed?

THE COURT: No, he is just telling us how it operates.

MR. LYSAGHT: I see. Thank you.

THE WITNESS: Here's a picture showing how far back that the blocking actually -- this is an actual photograph of the pictures.

THE COURT: Have these been marked?

THE WITNESS: No, this is my --

MR. GEEN: Some of the things that have been marked are blow-ups of these smaller pictures. So until I look at it I can't tell whether a blow-up has been marked or not.

THE COURT: I see it. All right.

THE WITNESS: These pictures here are the originals right here and the picture that he has got are copies of mine. These are pictures that I had made myself on the job site.

THE COURT: All right.

THE WITNESS: Now here is another picture here (indicating).

MR. LYSAGHT: May we see the exhibits that he is referring to, your Honor?

THE COURT: Yes.

THE WITNESS: There is another picture there wich I have taken at the seen of the accident.

THF WITNESS: All right.

MR. LYSAGHT: May we have that marked for identification, your Honor?

THE COURT: Yes. Just the two he showed me.

MR. LYSAGHT: Your Honor, may I have a voir dire?

THE COURT: No, let him go on and tell me how this works, please.

MR. LYSAGHT: He is putting pictures in his pocket, your Honor.

THE COURT: Well, he hasn't shown them to me so he can put them in his pocket.

MR. LYSAGHT: May we have them marked for identification, your Hono r?

THE COURT: No, not now. Only the two that he showed me.

(Third Party Defendant Bayshore Exhibit XXVII and XXVIII were marked for identification.)

xx MR. FISH: May this be noted, that this was dated in 1969, five months before the shipment in question?

THE COURT: All right.

THE WITNESS: That is true.

Now, what I said before was this, when they have taken the two top girders off all they had to do was to loosen these screws (indicating).

THE COURT: The two top girders? What are you talking about?

THE WITNESS: The two center ones on the picture.

MR. GEEN: The ones that are up high.

THE COURT: All right.

THE WITNESS: That represents either one of those two or both of them, we'll say. So in this case there is enough room in here that these guys come in, pull the nails off, take the block off, raise this up, do the same thing on the other side, drop it down, raise this up and then go on and pick the girder up and take it out without any interference at all in here. There is no interference.

There is plenty of room for this to lean over. And by doing that it can equalize itself.

THE COURT: Now, that refers to the top two, is that it?

THE WITNESS: The top two.

THE COURT: The highest two in Exhibit Bayshore No. XXI; is that it?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

THE WITNESS: Now, if I took this and dropped this down according to that picture over there that would mean that this girder right here would actually be down that low (indicating). It would be that low (indicating). It would just be below the bottom of this (indicating).
53 When this is in position here, and that's in position here and this block is in here like it's supposed to be, like this (indicating), that block is in here like this which all the drawings shows, we built all of this according to a set of specifications which we have in our file, there's not enough room between that girder and this block, so that meant the girder had to be raised up before this block could be taken out.

THE COURT: Now, that applies to the lower ones.

THE WITNESS: The three lower ones, right.

THE COURT: All right.

BY MR. GEEN:

Q When you were installing, or loading the barge, did you have to and did you put the blocks in before the girder --

A Well, we had to. We had to come down to within a foot or so and then the men would get in here and these blocks were hanging down and they would take the block and pick it up and two guys would get in there and take the block and put it in here and slip this down and put the block in, then when it came to the bottom they came in there and tightened the screws up.

So this is the sequence that we used and it was designed to be in reverse in the unloading process. That's not what I found when I went over there.

Q We'll get to that.

THE COURT: All right, now. Let me ask you this so that I can understand this.

You say as to these three lower ones they would have to unscrew those vises, is that what they really are?

THE WITNESS: We call them screws.

THE COURT: But they operate like a common vise, don't they?

THE WITNESS: Yes, your Honor, you're right.

THE COURT: All right.

THE WITNESS: I put this on here just to make it easier to handle, but normally this is just a round piece of bar with threads on it.

THE COURT: Now I am not sure that I understood what you were saying with respect to these lower three. In order to get the block out they would do what?

THE WITNESS: In order to get this block out you would have to pick this girder up.

THE COURT: Before you loosen these vises?

THE WITNESS: No, you can loosen the screws. Loosen the screws.

THE COURT: You could or you should? Would you? Which is it?

THE WITNESS: Should.

THE COURT: You loosen the screws.

THE WITNESS: Loosen the screws.

THE COURT: I see.

THE WITNESS: And then you hook the beam on there with your equalizing system and then start taking a strain, and as you start taking a strain the barge starts listing in the opposite direction which means you should be booming up at all times and still try to maintain a straight pull, not a side pull, and then you raise it up high enough that you can take these blocks out. Take them, and after they get high enough take the blocks out and this is supposed to have been flipped up like that on this side, on this side, and then everything is free.

THE COURT: Yes, but when they are raising that with the blocks in there it could be still wedged; isn't that so?

THE WITNESS: If you don't keep the boom and the load in the same perspective, yes. In other words, as the barge comes up the rig has to be booming up at all times. The barge is going down, that is the Century that was used -- the derrick, the derrick is going down, the barge is coming up which means you have got to be booming up as you take it on the load. Continuously. And to keep that load in a straight line because if it's pulling to either side it will tend to wedge here and it will tend to wedge here (indicating).

THE COURT: Yes, because the blocks are in.

THE WITNESS: Because the blocks are in. But if you keep everything in its perspective straight line it will come right on up, take the blocks out and then you can just pick it right on up.

-

BY MR. GEEN:

Q But the point is that initially you cannot, on this particular girder we are talking about, the lower one, you cannot take the blocks out without first lifting the girder?

A No way.

THE COURT: But you must first unscrew those vises; is that it?

THE WITNESS: First unscrew the vises.

THE COURT: As far as they will go?

THE WITNESS: Yes, ma'am, as far as they will go.

THE COURT: All right. I understand it now. We can go on.

Q Forgive me, I don't know if you remember if I asked you about -- yes, I am sorry I did ask you.

You mentioned before that some of the steel in the barges when they were returned would be in a bent condition. Were they thereafter used again in that condition? Or what happened?

A No, we had to straighten them. Either straighten or replace them. The inspection, U. S. Salvage would not let us use them if they was damaged.

Q To your knowledge, this was under your supervision, were any of the barges shipped from the Cape with any of the guide rails or the pins bent?

A No. They would not be accepted.

Q Did there come a time when you received word that there had been an accident involving a girder up in New York?

A Yes, one afternoon my immediate supervisor sent for me and I went in the office and he says, I'd like for you to do something right away, he says, it's very urgent. He said, there's been an accident on the cross bay involving a girder, pulled the lifting eyes out, and he says, I would like you to go down and investigate the accident. This was about 3 o'clock in the afternoon when I left Cape Charles. I drove into New York here and spent the remainder of the night. And the next morning I proceeded to the job site.

Q Was that the day after --

A This is the day after the accident.

Q That you arrived in New York?

A That I arrived in New York.

Q Approximately what time was it?

A I arrived at the job site right promptly at 8 o'clock because I was asked to be there as soon as possible.

Q Now, that morning did you go out on the scow?

A Well, after I arrived at the office I found out that I didn't park my car in the area that I thought I could, so I had to go look for a parking space, which took me a half an hour or so, and I came back and Don Phillips who was one of the engineers for Kiewit-Slattery took me out to the barge where the lifting loops were broken and the Century was damaged, and we spent some three hours, I did, looking around trying to gather up the information, taking pictures.

Q All right.

Now, to save time, instead of having them mark these small pictures into evidence, some of these have been marked in already on blowup, you understand, so we will use the ones in evidence already.

Now, When you got out to the barge was the girder in question with the broken loops still in place?

A The girder was still on the barge just as it was when we shipped it with the exception that the screws had been loosened.

MR. LYSAGHT: Objection, your Honor. I move that it be stricken, "just as it was when we shipped it". There is no indiction that he knew how it appeared when it was shipped and that he knew what happened to it between the time it was shipped until he arrived.

THE COURT: Let me hear the question, Mr. Reporter.

(Question read.)

Q You mean was it still sitting there on the scow?

MR. GEEN: Yes.

MR. LYSAGHT: It is the answer I am referring to, your Honor.

THE COURT: You are objecting to the answer?

MR. LYSAGHT: Yes, your Honor. And I move the latter portion be stricken.

THE COURT: All right, read the answer.

(Answer read.)

THE COURT: What are you objecting to? He is telling us what he saw.

MR. LYSAGHT: The conclusion, "just as it was when we shipped it".

THE COURT: Were you there when it was shipped?

THE WITNESS: Yes.

MR. LYSAGHT: There is no evidence that he knew what happened to it in between. I have no objection to him saying it looks like --

THE COURT: Overruled.

In other words, you are saying the blocks were still in there?

THE WITNESS: Yes, your Honor.

Q Did you take photographs of the girder T-205 and the blocks on the girder that morning?

A If it's all right, I don't know whether it's proper or not, but I'd like to tell it just the way I proceeded --

THE COURT: Try to answer the question.

The question is did you take pictures when you got there in the morning?

THE WITNESS: Yes.

THE COURT: All right.

Q Do you want to tell us what happened when you got there?

A Yes.

54 Q All right. Tell us what you did when you got to the barge.

A When I arrived to the barge, as I said, approximately 9 o'clock in the morning, based on the testimony that I have heard I didn't really know what direction, you know, north, south, east or west, but I found out yesterday what direction the barge was in so when we arrived to the site the tug pulled up at the west end of the scow where they were working on the girder at that time, the lifting loops had failed, there were men working on both ends with jack handles cutting the holes through.

I got on the barge and I walked from one end to the other on both sides, down one side, then back up the other side, then I got up on the top and I had to wait for half an hour or so before I could take any pictures on the top.

So I went back down, then I took pictures on all four corners where all four of the blocks were still in place. And I think we have some pictures --

Q Now, Defendant Bayshore's Exhibit No. XVI, Roman numeral XVI, in evidence, shows a block and Defendant Bayshore's Exhibit XVII shows a block.

Now, those are the only two blowups so you are going to have to correlate this for me.

You said you took pictures of all four?

A Yes.

Q Instead of duplicating these two, can you pick out the other two?

A What I'd have to do is take this picture here in order to fill my series of picrures. Those are the four pictures that I have taken.

Q May I see them? And this one (indicating)?

A No, this picture don't have nothing to do with the accident.

Q Well, I don't follow you. You're giving us these, there are two in evidence already.

A This is five, this here was on the north side (indicating).

Q The north side of T-205?

A Yes, the north side of T-205. This one here was on the north side -- I mean, I'm sorry, on the south side, the southeast corner, this one here (indicating), and this one over here was on the southwest corner. And this one over here was on the east, or the northeast corner (indicating).

MR. GEEN: Since we have all four together may I offer the four into evidence, your Honor?

THE COURT: Well, one has already been marked.

What was it marked?

THE CLERK: Two of them, your Honor, XXVII and XXVIII

THE COURT: No, the small ones we are talking about.

Do you have it, Mr. Fish?

MR. FISH: XXVII marked for identification.

THE COURT: No, this one (indicating).

MR. GEEN: One was marked Roman numeral XXVIII.

THE COURT: Now let's mark the others XXVIII-A, B and C.

MR. LYSAGHT: For identification, your Honor?

THE COURT: Yes.

(Third Party Defendant Bayshore Exhibits XXVIII-A, B and C were marked for identification.)

THE COURT: Now do you want to offer those, is that it?

MR. GEEN: Yes.

THE COURT: Is there any objection?

MR. LYSAGHT: May I have a voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. LYSAGHT:

Q Mr. Thibodeaux, you showed me before some other snapshots that you took at the same time.

Can I see them?

A These are the snapshots and --

Q And you put some in your pocket?

A These are some I took of the yard.

THE COURT: Now ask him about the four, the three that are now about to go into evidence.

MR. LYSAGHT: This is important, your Honor.

May I have these that he has shown me marked for identification that he took at the same time?

THE COURT: No, because we are going to consider these three which are marked for identification and are now being offered in evidence.

BY MR. LYSAGHT:

Q At the time you took these snapshots, sir --

MR. LYSAGHT: Withdrawn.

Q When you got out to the scow there were men drilling into the top of the girders; is that correct?

A Yes.

THE COURT: Now ask him about those pictures.

Q Is that when you took these pictures? You took them after?

A These pictures here was taken while they were working.

THE COURT: No, the three that were marked. The others are already in evidence.

MR. LYSAGHT: That's what I'm referring to, your Honor.

Q These three pictures that were marked for identification as Defendant Bayshore's Exhibits XXVIII-A, B and C, when you got out to the scow there were men working on the girders; is that correct, sir?

A On that girder.

Q On that girder?

A Yes.

Q T-205?

A Right.

Q Did you take these pictures while the men were working on that girder?

A As I said before, I walked from one side of the girder all the way around, made a complete circle around the girder and examined the girder. I then came to the west end of the girder and got on top of the girder where the men were working.

My intention was to take pictures, but I couldn't take pictures because they were working. So I came back down and I proceeded to take pictures of each stanchion and the blocking that was in there.

Q And they were working up on top of the girder with jackhammers?

A Jackhammers, yes.

Q How many men were working up there?

A There were people working on both ends. I see two guys on -- they might have been two guys while the other guy was standing there with him.

Q On each end with jackhammers?

A Yes.

MR. LYSAGHT: I will object to them, your Honor.

THE COURT: On what ground?

MR. LYSAGHT: Well, I don't know what the relevancy or materiality is.

THE COURT: Overruled.

MR. LYSAGHT: I have no objection if they merely represent what he observed when he got on the scow.

THE COURT: He said he took pictures, that's all he is putting them in there for.

MR. LYSAGHT: Therefore I think they are irrelevant, your Honor.

THE COURT: Received.

(Third Party Defendant Bayshore Exhibi-s XXVIII-A, B and C were received in evidence.)

xx THE COURT: We are going to recess until Monday morning.

Exhibit XXVII then is a photo of the block in a situation in Cape Charles?

THE WITNESS: Yes, your Honor.

THE COURT: Exhibit XXVIII is a picture of one corner of this girder here in --

MR. GEEN: That was marked before to demonstrate to your Honor that it couldn't have clearance. That's the shorter one.

THE COURT: But it is one in the four series; is that right?

MR. GEEN: It is now one in a series of four, yes.

THE COURT: All right.

MR. GEEN: Does your Honor have Exhibit XXVIII in evidence?

THE COURT: No. Mark it now in evidence.

(Third Party Defendant Bayshore Exhibit XXVIII was received in evidence.)

xx THE COURT: Now we are going to recess until 9.30 Monday morning, gentlemen.

(At 4.25 p.m. an adjournment was taken to Monday, June 10, 1974 at 9.30 a.m.)

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55 cms

RAYMOND INTERNATIONAL

vs.

PETER KIEWIT SONS' COMPANY, etc. et al. 70 Civ. 2712

vs.

BAYSHORE CONCRETE PRODUCTS COMPANY.

New York, June 10, 1974;
9.40 o'clock a.m.

(Trial continued.)

- -

THE COURT: You may proceed, Mr. Geen.

CLIFFORD THIBODEAUX, resumed.

DIRECT EXAMINATION (Continued)

BY MR. GEEN:

Q Mr. Thibodeaux, when we adjourned on Friday we had just marked into evidence some photographs which you took of the four blocks on girder T-205.

Can you describe how those blocks looked in relationship to the girder and what if anything besides the seat and the side pieces of metal were holding them in place at the time that you saw them?

A Well, when I arrived over there on the following morning, as I stated before, the blocks were all in position.

The supports that support the block on the south side were bent, which is shown in photographs 7 and 6, and -- 7 and 3, rather. The nails were still in the blocks as they were when we loaded them.

Q Can you describe what the nails look like?

A Well, when we put the nails in there, of course, they were shiny, they were new nails. After several days those nails are rusty. We drive them in part of the way, then we bend them over to keep the head from going through the hole of the piece of plate that it's driven in through.

Q The nails that you saw on the morning when you were looking at those blocks, were they shiny nails or were they rusty nails?

A They were rusty nails.

Q Were they straight or were they bent?

A No, they were bent.

Q Did they look to you any different, or did they look the same as the nails, except for the rust, that you had put in immediately before the barge left?

MR. LYSAGHT: Of course I object to this, your Honor. There is no evidence that this man actually saw the particular nails before the shipment.

THE COURT: Yes, and it is leading moreover.

MR. LYSAGHT: Yes, your Honor.

THE COURT: Ask him what he saw, Mr. Geen. He is not testifying now as an expert, he is just telling us what he saw and what was done. But when you asked him if the nails were bent, what were bent, what could be more leading?

Q Mr. Thibodeaux, did you see the loading of the barges prior -- sorry, the scows, prior to the scow leaving Cape Charles?

A This particular voyage I had.

Q Will you tell us in what detail you observed this barge, if any, prior to its leaving Cape Charles?

A Well, first I have to make a visual inspection before the U. S. Salvage makes their inspection to make sure that we had everything as near to their recommendation as possible. They tell us what they expect us to do and how they want us to do it and it's my place to see that they are loaded in the order in which they are supposed to be loaded, which I stated before, and also to see that all blocking and tightening of all the screws and the nails for safety precautions has been put in place. Chains to hold the blocks also have to be on there.

Q Can you tell us, the blocks, the condition of the blocks that you saw on the morning when you went to the site of the accident, can you tell us what was their condition as far as the nails, whether they were the same or different?

MR. LYSAGHT: Objection, your Honor. Leading and suggesting.

THE COURT: Ask him what he saw.

MR. LYSAGHT: Also, if I may, your Honor, it is irrelevant.

Q What did you see, Mr. Thibodeaux, when you looked at the blocks? I'm especially asking you now about the nails.

A When I arrived over there that day there was two things that I checked first. One was to see that the screws had been loosened, which they had been, two was to see whether the blocks had been taken out, or the nails had been taken out and there was no evidence that the nails had ever been taken out because they were still bent.

MR. LYSAGHT: I object to that, your Honor, and move that it be stricken, the latter part. No evidence that the nails had been taken out.

THE COURT: Overruled.

Q Mr. Thibodeaux, I have a photograph here which is marked Bayshore Exhibit XII for identification.

Is that a blowup of a small photograph that you took already in evidence (handing)?

A I would say XII is my copy of VII I would say.

Q Before you were saying that when you observed the metal uprights, you said one of them was bent and you referred to a photograph. Which photograph did you refer to?

A When I said metal upright what I was referring to were mainly, we can take any one of these photographs, VIII or VII would show the same thing. The support that I was referring to was the support that holds the block. Which was straight when it left our plant, but it was bent when I arrived on the site.

MR. GEEN: Your Honor, may I show the Court --

THE COURT: All right.

MR. GEEN: This is Exhibit XXVIII in evidence (handing).

I have no further questions.

MR. LYSAGHT: May I, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

XX BY MR. LYSAGHT:

Q Mr. Thibodeaux, what was your position in April of -- what was your position at the time this particular scow was loaded down at Cape Charles?

A My position was the same as it is now, production manager for Bayshore Concrete Products.

Q At that time did you have any individuals working under you?

A Yes.

Q How many people were you in charge of at that time?

A Well, when you say in charge of, directly the supervisors mainly, and under the direction of the supervisors they have their people.

Q But I mean how many people were working under you, subordinate to you?

A I would say in the neighborhood of maybe seven or eight supervisors.

Q How many people worked under those supervisors?

A It varies, anywhere from 13 to 25, 30 peoole. Depending on what they were doing.

Q What were the functions of these individuals that worked under the supervisors?

A Well, are you asking me now about the girders or about Bayshore as a whole?

Q Bayshore as a whole.

A We have a foreman in charge of the pile spinning, we have a foreman in charge of stressing, a foreman in charge of pre-stress of the smaller beams. We have a foreman in charge of the monolithic decks -- I mean the cantilever beams, we have one in charge of the simple T's which we are discussing here now, and we had a superintendent that worked under me.

Q Were there laborers that worked under those foremen?

A I stated before each foreman has a crew of people, a group of men that worked.

Q Are these the supervisors under seven people that you referred to, or were there more?

A They have what we call foremen, then we have what we call lead men that work under the foremen.

Q What I'm trying to get at is this, sir:

Starting with you and counting, the supervisors that worked under you the individuals that worked under them, the foremen that worked under them the laborers that worked under them, how many people were you superior to as far as the position was concerned?

A I think I have already stated approximately six or seven foremen.

Q Foremen?

A Foremen.

Q How many laborers worked under those foremen?

A I stated before that it varies. The various places, some had 13 men, some had 20 men, some had 35 men, some had 40 men. Sometimes three or four.

Q At the time this particular scow was loaded how many men worked under you?

A On that particular operation, on the loading operation --

Q No. At that time, in other words, at the date that this scow was loaded how many people worked under you completely?

A I would say the same as I just mentioned, approximately the same number of supervisors and the number of workers total, I would say in that particular time we had in the neighborhood of maybe 210, 230, something like that.

Q They all worked under you?

A Well, the supervisors worked directly under me.

Q What was your salary at that time, sir?

A My salary?

Q At that time?

THE COURT: What is the relevance of that?

MR. LYSAGHT: All right, your Honor.

A Well, my salary is--

Q You don't have to answer the question, her Honor said it was irrelevant.

Now, sir, what date was this particular scow loaded at Cape Charles?

56 A I would say just back from memory, not going back to the record, I would say roughly two or three days prior to it arriving at the site.

Q Can you give me a date and time?

A What was the date it was delivered then?

The 28th I think it was.

Q Well, sir, I am asking you.

A I'm just having to go back from memory. I think -- what was it, June 28th? May or June?

Q You don't know?

A Right offhand I don't know.

Q You are not sure?

A Not the exact date. I think it was loaded around the 26th if I remember.

Q Is your testimony, sir, that when this particular scow was loaded down in Cape Charles, whenever that was, that you went aboard the scow and looked at each name attached to each block?

A Well, that was my responsibility and I tried my very best to do just that.

MR. LYSAGHT: I move that that be stricken as not responsive, your Honor.

THE COURT: Well, if you don't recall, say you don't recall, but the question is did you look at each nail? Yes or no? You can answer that.

A I would say yes.

Q And you have a specific recollection of looking at the blocks and the nails on each one of these girders; is that correct?

A That's what I said, yes.

Q And you have a specific recollection as to the position of the bolts and the type of nails that were inserted into each block?

A I didn't say anything about a type of nail. I just said nails.

Q Well, you say that there were new nails put into the blocks of 205 before it left Cape Charles.

A Each time it's loaded new nails.

Q You have a specific recollection that they were new nails?

A Because I checked them, yes.

Q You checked each nail?

A Each block for the nail to make sure the nail was in.

Q You went down and checked each nail and you checked each block and each bolt. What time did you go down to make these observations?

A Maybe the day after the accident, which I think was the 29th.

Q I'm sorry, I'm talking about the time the scow was loaded at Cape Charles?

A Well, I made my inspection prior to the U. S. Salvage inspection.

Q What date was that, sir?

A I have to guess, and I think --

Q I don't want you to guess.

A I have to guess.

Q You are testifying under oath that you --

THE COURT: Well, just a moment.

Are you testifying that you don't remember the date?

THE WITNESS: I'm not too sure, your Honor, whether it was the 25th or the 26th. Some time the barges were loaded they might lay up there for maybe a week, maybe two weeks before it was brought down.

THE COURT: All right.

Q Lay up in Cape Charles?

A Yes.

Q And this was the 25th of what month, of what year?

A Well, 1969 -- I mean 1970, rather, but I'm not sure whether it was -- June I think it is.

Q June of what?

A I think it was June, I think.

Q Of what year?

A '70.

Q Are you aware that this accident happened in April of 1970?

A It might have been April. I got my months mixed up.

Q And it might have been that some of your laborers down there put in older nails into these blocks, too; is that correct?

A No.

Q You're sure of that?

A Well, when I say sure, No. 1, the nails --

Q No. Are you sure, sir, or are you not sure?

A I'm sure that we didn't use used nails. No, I'm sure of that.

Q And you think it was loaded in June of 1970; is that correct?

A Well, as I said --

MR. GEEN: Your Honor, that is argumentative.

THE COURT: Yes.

Q Didn't you employ competent foremen and laborers down there in Cape Charles?

A Yes.

Q Didn't you rely on them to insert the nails and bolts?

A They inserted the nails, but I made the final inspection.

Q Your inspection would consist of seeing that the things are properly tied down; is that right?

A Make sure the nails are in there.

Q As a matter of fact, a lot of that tied down material was reused?

A The only thing that was reused, in most cases, not in all cases, was the blocks. If they came back. Sometimes the blocks didn't even come back.

MR. LYSAGHT: With your Honor's permission, may I have a copy of the contract that was marked in evidence by the plaintiff? I think it was marked Plaintiff's Exhibit 2, I'm n ot sure.

THE COURT: I guess plaintiff's counsel has that.

MR. FISH: Here you are (handing).

MR. LYSAGHT: Thank you.

Q Would you say that these nails and these screws constituted tied down material?

A Yes.

Q And isn't it a fact that pursuant to the provisions of the contract, and I am referring to the third page, your Honor, counting it physically, that the contract provided that a 90-per cent credit will be given on the above rates if all the locking and tied down material returned to Cape Charles can be reused for succeeding shipments of similar pieces.

Is it not a fact, sir, that that provision was in the contract?

A Provision might have been in the contract, but what we could use had to be determined by the people that were directed to what they could use and what they couldn't use.

Q Doesn't that provision refer to blocking and tied down material, sir?

A It does.

Q Is it not a fact that blocking and tied down material were reused?

A I said before, in my statement before that the screws were used, in some cases they were bent and we had to replace those, the support for the blocks were bent, which some of the photographs shows what I found in my inspection, and nails is something that you don't recover, you pull them out and throw them on the barge, they get washed overboard.

Q Sir, couldn't reused blocks containg nails become rused?

A No, if they were nails on the block we took the old ones out, if there were any left.

Q By the way, there was a plate holding these blocks in place and nails were driven into that plate to hold the blocks in place; is that correct?

A Yes.

Q And the nails that were shown in the exhibit, I am showing you Bayshore Exhibit XVI marked for identific ation (handing), nails were used to secure the blocks to these plates and then bent over; is that correct?

A Right. That's correct.

Q In the manner as shown in that exhibit; is that correct, sir?

A You're talking about the side plates there. There is two sets of plates involved in that. There is a plate also between the screw and the block which was also nailed on.

Q I see.

A So you don't want to get that confused.

Q No, I won't get it confused.

Now, sir, you were down in your office and you got a call about, I think you said about 3 p.m., after the accident, that something had happened up here in New York; is that correct?

A What I said, my supervisor called me in and told me about the accident and asked me would I immediately come down and be there by the following morning.

Q And you came up here to New York?

A Came up to New York that night.

Q And there came a time that you got onto this scow; is that correct?

A As I said, about 9 o'clock in the morning.

MR. LYSAGHT: With your Honor's permission, may I put up the exhibit that was being utilized to demonstrate?

THE COURT: Yes.

Q Sir, were these exhibits specifically made for this trial?

A I had that made, yes.

Q You had these made for this trial; is that correct?

A Yes.

Q And these blocks that you are referring to, these wooden blocks that were positioned against the beam, were they rectangular in shape?

A Not in all cases. Some time they were. The blocks were 12 by 12 in some cases they were 10 by 12.

Q Could you tell me their dimensions as you would look at them sideways?

A Well, if you want to say for an example, like I say some were 10 by 12's and some were 12 by 12.

Q So in other words, sir, if I were to look down the side of this girder and saw the blocks they would be approximately 24 inches square?

A No.

Q Or 12 inches square?

A This wouldn't be 12. This one here would be 10 by 12.

Q In other words, if I were looking down the side that block would be about 10 inches square; is that right?

A No, sir.

Q Help me out, all right?

Could you tell me how square that block would be as I looked down the side here?

A I just told you about roughly 10 by 12. About 24 inches long.

Q And 10 inches by -- I see. And there was a block situated on -- well, were there blocks situated on all ends of the particular T girder?

A Yes.

Q Now, sir, this particular girder measured about eight feet across?

A They varied, but most of them, yes, I would say that's a good average.

57 Q Are you aware that --

A Some were less.

Q In the answers to the interrogatories your firm stated that they were eight feet wide at the top; is that correct, sir?

A Like I said, they varied, but that's a good average.

Q So that if we were describing it as a T, that is the crossbar of the T, eight feet across?

A Right.

Q And in the center you had the centerpiece; is that right?

A Yes.

Q Are you aware that your firm stated that they were two feet wide at the bottom; is that correct, sir?

A Yes, 24 inches wide at the bottom.

Q Now, when you came aboard the scow that day you came aboard by tug; is that correct?

A That's correct.

Q And of course since you were in charge of securign these things down in Cape Charles you were aware that it's good practice to tie down an object and particularly a heavy girder at night; is that correct?

A That's correct.

Q And when you boarded the scow I think you said you saw a man working on top up here; is that correct?

A That's correct.

Q And I think you showed us a snapshot in which holes were already drilled through this concrete; is that correct?

A That I did.

Q As you boarded how many men did you see atop it?

A If my memory was right what I stated on Friday was there were two people on either end. One working and one standing.

Q So you had two men down here on this end and two men down here on this end; is that correct?

A That's correct.

Q Total of four. And I believe you said they were working with jackhammers?

A That's correct.

Q Digging into the concrete; is that correct?

A That's correct.

Q And that blocking was in place so that the girder wouldn't tip over as they were working; isn't that correct, sir?

A That's correct.

Q Your firm had a man stationed up here, did they not, Mr. Kenneth Brigit?

A On the beginning of the jo b, yes.

Q How long before this incident occurred did he first come up to this job site?

A Like I said, he was there long before the accident.

Q Didn't he remain there?

A No, he didn't.

Q He didn't remain there?

A No.

Q How long a period of time was he up there?

A Well, again, I'd have to do some guessing, and I'm not too sure. Say a couple of months, maybe even Longer. So he was on loan from Raymond, so when Raymond needed him they took him and sent him --

Q Was that while the work was going on?

A Well, we were doing our part at Cape Charles and they were erecting here, yes.

MR. LYSAGHT: No further questions.

CROSS EXAMINATION

BY MR. FISH:

Q Mr. Thibodeaux, when you arrived at the job site after the casualty your object was to determine the cause of the casualty?

A Well, when you say determine the cause, we wanted to find out what happened and why it happened.

Q Did you talk to any of the operating men on the derrick?

A Well, I can answer that very frankly that I got no cooperation from anybody that I tried o talk to. Nobody knew anything. And just one of those t ings you couldn't get nobody to talk. The only person that I was able to talk to at all was Mr. Phillips, Don Phillips who carried me out to the site. No one else would talk to me, including the people that worked for Raymond, the people that I had been working with for years. They were reluctant to even say anything.

Q You didn't in fact talk to the captain of the Century?

A No, sir.

Q You didn't talk to the mate?

A No, sir.

Q Did you talk to Mr. Comer?

A No, sir.

THE COURT: I don't understand the question.

Is it that they didn't talk to him or he couldn't, they refused to be interviewed?

MR. FISH: Well, he says that he had difficulty in interviewing people.

THE COURT: Yes, that's why the question now is not clear.

MR. FISH: Well, I'm asking him if in fact he did talk with the captain, the mate of the Century and Mr. Comer, and he says no.

Q Is that correct?

A That's correct.

Q Did you talk with any of the men who had actually been working on the scow at the time of this casualty?

A As I stated before, Mr. Fish, the only person that I was able to talk to, and I got no information from him, was Don Phillips. And any time I asked a person a question they didn't know anything. "I don't know".

Q Do you know the procedures of going through channels? Did you make any attempt to go to higher authority to get cooperation in this investigation of yours?

A Well, I'll tell you one thing, I'll have to give you a long story about this.

When I drove up to the office that morning I got a very, very snotty reception from the project manager who was --

Q Who was that?

A I don't remember the man's name, but the guy who was in charge of the job at the time. In fact, he ran me out of the yard. He made me drive my car out and go find a place to park. Then when I came back the only person that I could get to talk to was Don Phillips, that's the only person --

THE COURT: Who did he represent?

THE WITNESS: Kiewit.

Q What was his job?

A I'm not sure what his title was, Mr. Fish. I know he was an engineer and I know he was at Bayshore prior to coming down here and I had worked with him before. So I'm not sure what his title was there.

Q When you couldn't get cooperation did you put a telephone call through to your chief down in Cape Charles and tell him about that?

A I did talk to my supervisor, yes, sir.

Q What did he tell you?

A Well, he asked me if I took some pictures, and I said, yes. And he asked me what the status was, and I explained to him over the phone what I found and I told him that the blocks hadn't been taken out and I told him that were cutting holes in the top of the girders.

He asked me did I get pictures of the blocking, and I said, yes. I then went back to my office that very same afternoon, had the pictures developed and give him an oral explanation of what I found, and he was happy with that.

Q When you say you went back to your office, do you mean you drove back to Cape Charles that afternoon?

A Yes, sir. I left the job site approximately noon. Mr. Phillips took me out to lunch, and after that I went on.

Q How long did it take you to drive down to Cape Charles?

A It's about an eight-hour drive I would say.

Q And you had driven up most of the night before?

A I got in at Rockaway Beach, I would say early morning, 1, 1.30 in the morning.

Q What time did you leave Cape Charles?

A About 4.30 I would say.

Q Did you make any written report of your investigation?

A No, sir. The only thing I did is report it to my supervisor what I found.

Q Do you know whether any written report of investigation was made by or on behalf of your company?

A Mr. Fish, I'm not sure, but I think we have a report, we consulted with our design engineer and we passed the information on to him of what I found, and w think there was a report made based on what I found and his analysis of it.

Q Do you have a copy of that report?

A No, sir, I don't.

Q Do you know where it is?

A Well, I'm assuming there is one, I think there is one, but I don't know where it is.

THE COURT: I didn't get that. What report was that that you referred to?

MR. FISH: Any report that was made as to the investigation into the cause of this casualty by or on behalf of the third party defendant.

He says he thinks there was one, but he doesn't know where it is now.

Q You of course didn't see the discharge of T-205, did you see the discharge of any other similar beam by the derrick Century?

A No, sir. The derrick was out of commission when I went down there.

Q You hadn't seen it in operation before?

A No.

Q This beam, what did it rest on when it was on the deck of the scow?

Did it rest on the deck?

A No, sir, it rests on the steel beam, that represents a steel beam that went clear across the deck of the barge.

Q So this concrete, you call it a beam or a girder?

A Well, this is a concrete girder. Concrete beam.

Q The concrete beam rested on two transverse metal beams on the deck of the barge?

A 14 by 14 H-beams, yes.

Q That's the only contact they had?

A Well, there was a little piece of plywood put on top of that just to act as a softener.

Q You did have dunnage between the beam and the metal?

A A little piece of plywood, yes.

Q How big?

A Three-quarter inch.

Q How thick?

A About 14 inches wide.

Q That is the only thing you had there?

A Under the bottom of it.

Q What else did you have in the way of protection for this beam?

A On the stanchion that you see there there was a piece of half-inch plywood bolted to the stanchions, and that was to protect the girder.

Q So there was dunnage in there as protection from contact between the concrete and the steel?

A Yes, sir.

58 Q Exhibit 20 is a drawing of the beam as clamped in its support; is that correct?

A Right, sir.

Q That doesn't show the actual bottom of the beam in this sketch?

A That is true.

Q It just shows the upper portion of the arrangement, so properly we should have a jagged line running across indicating a --

A Right there (indicating).

Q Those diagonal lines.

I notice that you have drawn -- did you draw this?

A No, sir.

Q I notice that it was drawn to show that the block which bears against the vertical portion of the concrete is in direct contact with this slanting line that is where the concrete begins to spread out from the vertical part and form part of the horizontal, overhead surface.

What do you call that in there?

A Well, we call it a chamfer is what we call it.

Q A chamfer?

A Yes.

MR. GEEN: I'm sorry, I didn't hear the word.

MR. FISH: Chamfer, c-h-a-m-f-e-r.

Q I thought a chamfer was where you cut a bevel along the edge?

A That's a bevel, right there.

Q And that you call a chamfer.

Now, this drawing shows that the block is right up against the bottom of the chamfer, and it's for that reason that you couldn't lift the block out and pull it out?

A That's correct.

Q That is not the actual condition that existed on these beams, is it?

A Yes.

Q Are you sure of that?

A Well, I can't prove it to you right here, take a look at this (indicating).

Q Maybe I can prove it to you to the contrary on some of these photographs?

A Which one are you talking about, the 205? I could show you some others that doesn't represent that, but T-205 is what we are talking about.

Q Well, I have here Bayshore Exhibits marked for identification Nos. XXII, XVII and XVIII.

Can you identify those photographs (handing)?

A Mr. Fish, these photographs right here are the same photographs that you see right there (indicating). The one that I had marked in my own handwriting, VII, VIII and V and et cetera.

Now these are the same photographs that you are talking about right there.

Q Well now, Exhibit XVI marked for identification, that is the one with the markings for the nails. I ask you to observe the corner of the block over that marking A and ask you if it isn't a substantial number of inches vertically from the corner of that block up to the bottom of the chamfer?

A Couldn't pull it out, sir.

Q What?

A You could not pull that block out vertically.

Q I asked you if there was a space --

A I says no. I'm trying to tell you no, there isn't enough distance there to pick that beam up in order to pick this up high enough.

Look at the distance between this point and this point here (indicating) and look at the distance between that point and that point there (indicating).

Q Well, we will have to identify those for the purposes of the record?

A But that's only one block. Let's talk about all four of them, if you don't mind.

THE COURT: May I see that, please?

MR. FISH: Yes, your Honor (handing).

THE WITNESS: That's only one. We have got three more like that.

MR. FISH: I was pointing out to the witness that from the point A, up from that corner up to the chamfer which is a diagonal line running across there is a space of a considerable number of inches. And he says there wasn't any space between --

MR. GEEN: No, your Honor, I have to --

THE WITNESS: I didn't say there was --

MR. GEEN: Excuse me. Just one moment now.

You were pointing to one picture and the witness answered there were four blocks and the condition on the four blocks wasn't the same, and I object to Mr. Fish showing you one of those pictures and arguing and saying, look, you see, the witness is wrong.

He was referring to the four pictures marked all XXVIII-A, B, C and D, and he said that twice now and I think that's unfair, Mr. Fish.

THE COURT: Well, what I think he said was that there wasn't enough space.

MR. FISH: All right.

Q My question was, how much space was there on that particular picture between the top of the block and the bottom of the chamfer?

A Before I answer that question to you, sir, I would like to point out one thing. This support is bent down approximately, I have to guess at it, but we have an engineer can scale it and tell you exactly how many inches, this block is not in the position it was when it left Bayshore. This beam has been picked up and the beam has gone back down, and because of that the block has forced the support down. This support is bent.

Now, if you take this in a straight line, let's see if I can find the one that's halfway bent that I can show you, if you just took for an example -- now here, if you take this for an example, that's the comparison, you're trying to tell me this right here has sufficient clearance. It doesn't.

MR. GEEN: Excuse me, Mr. Thibodeaux, you are referring to another picture and it is unidentified for the record.

THE WITNESS: Yes, it is.

MR. FISH: It's XXVIII -- is there any letter on that?

MR. GEEN: There is a number in ink on the front of the picture in the right-hand corner marked No. 5.

MR. FISH: Now I move to have that answer stricken as completely non-responsive to the question.

THE COURT: All right, let me hear the question and the anwer, Mr. Reporter.

(Question and answer read.)

THE COURT: Ask him the question again.

MR. FISH: Will you reread my question for me, please?

(Question read.)

THE COURT: Now, which picture were you referring to? Would you give the number, please?

MR. FISH: We are talking about the one with the red markings on it which is Bayshore's Exhibit XVI marked for identification.

THE COURT: That's not in evidence?

MR. FISH: I thought it was, but -- this one with the red marking, did you put that in evidence, Mr. Geen?

MR. GEEN: Yes.

THE COURT: Yes, we have that marked in evidence.

MR. GEEN: It is XVI in evidence.

Your Honor, I'm not sure of whether the form of the question is proper, asking the witness how much space is there on the picture.

MR. FISH: Not on the picture, the actual object as delineated by the picture. That's the proper understanding, and you know it.

MR. GEEN: Excuse me, Mr. Fish. I believe that your question said how much space was there on the picture.

MR. FISH: All right, go on. I suppose that's ambiguous.

MR. GEEN: I'm not going to quarrel with you, Mr. Fish.

MR. FISH: If you want to make an objection, make it.

MR. GEEN: I did.

THE COURT: Let's proceed, gentlemen. The witness is now asked to tell us if he knows how much space there is between the top of the block and the chamfer as indicated in the picture.

THE WITNESS: I would say in the picture as is shown now I would say you have got approximately seven to maybe eight inches.

BY MR. FISH:

Q It could be more?

A Well, approximately. I didn't give you an exact figure, I gave you an approximation.

Q Referring to this photograph which is marked Exhibit XXVIII and has the number 5 on the face of it, if you look at that block in that picture you will see a substantial chamfer onthe top of the block facing the cement; is that true?

A Yes.

Q And that would facilitate pulling the block up and out if you tried to do such a chamfer?

A Are you asking me a question?

Q Yes.

A This block wasn't made specially with a chamfer on it. The ends might have been rolled off by use, you know, but it wasn't made specially for that purpose.

Q As a matter of fact, these blocks got pretty well beaten up on occasion, didn't they?

A Well, we lost some of them, we had to replace soem of them. Some of them split and we had to replace them.

Q Do you have here the four photographs which constitute I believe Exhibit XXVIII which show the four supports? Maybe there are some over here.

A That's right. Here it is. If you want to take a good look at these, these give you a pretty good representation. These two blocks here was on the north side, these two blocks was on the south side.

Q Will you kindly show me on those photographs the chains that you have been referring to which keep the blocks from getting lost?

A The chains was off.

Q They weren't there?

A Weren't there when I arrived, no, sir.

Q Were they there when the scow left --

A Yes, sir.

Q So that would indicate that something had been done to that attachment; right?

A It was off, yes. The blocks were there but the chain was off.

Q I believe you said that when you arrived on the scow these screws for the blocking had been loosened but had been tightened at the time you came on board the scow?

A No, sir, I did not say that. I said they were loose.

Q Oh, they were loose all the time you were there?

A They were loose when I got there, yes, sir.

Q How loose were they?

59 A As far back as you could screw them without touching the block. They were flush with the upright. Just in the same order that you see right there (indicating).

Q How far can they be screwed forward from the position that you saw them if there was nothing in front of them?

MR. GEEN: I'm not sure I understand.

Q You could screw them in about eight inches.

MR. GEEN: You mean if --

MR. FISH: I said if there was nothing in front of them.

MR. GEEN: That means no block.

Q No block, nothing.

A About eight inches, roughly.

Q So that screw would permit an adjustment of about eight inches?

A Yes.

Q And that beam was loose in its support when you saw it?

A Yes, sir. Just as the picture shows.

THE COURT: When you say beam are you talking about the girder?

MR. FISH: The T-beam, T-205.

THE COURT: All right. That was lose in the sense that the vises had been screwed to their maximum position?

THE WITNESS: Yes, your Honor.

Q There was no grip on the beam?

A No.

Q How many scows did you use in this operation for this general type of beam?

A If my memory is right, I think we had four. Total of four.

Q That would indicate that on this particular scow, I believe No. 1400, was it?

MR. GEEN: Yes.

Q There had been maybe 10, 12 or possibly more trips with loads?

A Oh, yes. Definitely. More than that.

Q More than that.

How many would you say that this scow had made?

A I would say, let's see -- I'd say probably 15, 20 trips.

Q And you had had no report of any prior trouble in lifting these beams off the scow?

A No, sir.

Q Would that indicate to you that the people who discharged these beams had a practical method of doing so?

MR. GEEN: That is objected to, your Honor.

MR. FISH: He is an expert in loading and discharge?

THE COURT: Yes. Overruled.

A We know that Kiewit-Slattery has done a lot of heavy construction, and we know that Raymond has done a lot of heavy construction. So, based on what we knew about the people, they had the equipment to do it.

Q And they did it up to this point?

A Up to that point, yes.

Q I believe your testimony is that on this particular type of beam once you have got the block in there and the beam settles down that you can't take that block out, it's just physically impossible, unless the whole concrete beam is lifted some inches?

A That's what I said, yes, sir.

Q Will you tell me, please, why you used any nails at all if that's so?

A Well, that's besides the point, whether I use any nails at all, that's not my doing. The nails are put in there by the request of U. S. Salvage, not by me or by Bayshore. We had nothing to do with that. We were told to put them in and we put them in.

Q So you saw no useful purpose in putting the nails in?

A That's besides the point. I'm not to make a decision on that. The people that's hired to inspect the barges had the authority to make the decision what they wanted.

Q Did they give you any written directive to that effect?

A Mr. Fish, I think I'd have to go back to our records to check that, but I'm sure we have.

MR. FISH: If I could have just 30 seconds, possibly to review my notes, your Honor.

Q On these other two girders that you said formed the upper tier, was there any blocking underneath those?

A No more than they have on the T-205.

Q Well, they were at a higher level, they wouldn't rest on the same steel beam.

A See what you have, Mr. Fish, at that particular point the beam itself in between the uprights was built up so that it would have made it automatically higher, you see.

Q The steel --

A There was a filler in there that was made for that purpose.

Q Of steel construction?

A Yes.

Q Any wood filler in there?

A Same amount of wood that was put in, a piece of three-quarter inch plywood by 14 inches wide by the width of the soffit.

Q So they built up the rest, but they didn't build up the clamping arrangements to the same height?

A Right, sir.

Q Was there any reason for that?

A No, sir. I couldn't tell you. Who designed it designed it that way, so I really couldn't give you any particular reason for it.

MR. FISH: That's all I have, your Honor.

THE COURT: Is there any redirect examination?

MR. GEEN: No, your Honor.

MR. LYSAGHT: Just one more, your Honor.

FURTHER CROSS EXAMINATION

BY MR. LYSAGHT:

Q Sir, I believe you stated when you arrived up in New York everyone was very snotty to you, you received a very snotty reception?

A Very cool reception, yes.

Q And the project manager wouldn't even let you park your car in the lot; is that correct?

A Well, put it this way:

Before he even told me I couldn't park my car he told me to get the hell out of there, that's what he told me to do.

Q When he found out what happened you can understand it, can't you?

MR. GEEN: That is irrelevant, your Honor.

THE COURT: Yes.

Objection sustained.

Q Sir, were you as careful in your design of the strands of this rope that was used as a lifting device as you were in tying down your scows?

MR. GEEN: Excuse me.

A Yes.

MR. GEEN: Excuse me. This man didn't testify that he designed the lifting device. Do you mean Bayshore?

THE COURT: Well, that calls for a conclusion on the part of the witness anyway.

MR LYSAGHT: I will withdraw the question, your Honor.

THE COURT: All right.

Is there anything further of this witness?

MR. GEEN: No.

THE COURT: All right.

Thank you. You may come down.

(Witness excused.)

THE COURT: Do you have any more witnesses?

MR. GEEN: No, your Honor.

The third party defendant at this time rests, your Honor.

THE COURT: Do all parties rest?

MR. LYSAGHT: Yes, your Honor.

MR. FISH: Plaintiff rests, your Honor.

THE COURT: All right.

There will be due from each party proposed findings of fact and conclusions of law keyed to the record Monday, August 5th.

Now, the reason I am allowing that length of time is the reporters are busy and they are not apt to get the record out immediately. So that you will have the record in about a month and the proposed findings of fact and conclusions of law are due on Monday, August 5th, by 5 o'clock that day.

After that, gentlemen, the Court may require an oral argument, but first I would like to get your findings, proposed findings.

All right, thank you very much, gentlemen.

MR. GEEN: Your Honor, will it be necessary for counsel to be here on that day, or --

THE COURT: No, no. Just file it. After that I will notify you of the possibility of an oral argument if I feel further argument is desirable.

MR. LYSAGHT: Does your Honor wish the exhibits that were marked into evidence?

THE COURT: Yes, they would be used by you in making your findings along with the testimony. When you make a finding site an exhibit or some testimony which supports your proposed finding.

MR. LYSAGHT: Thank you, your Honor.

THE COURT: But each lawyer is responsible in this court for his own exhibits, so you hold on to your exhibits. You old on to them until we call for them.

All right, if there isn't anything further.--

MR. FISH: Your Honor, you didn't mention any brief.

Will the requests for findings of fact and rulings of law be sufficient?

THE COURT: Yes.

All right, thank you very much, gentlemen.

(Time noted: 10.40 a.m.)

PLAINTIFF'S EXHIBIT 1.

RAYMOND INTERNATIONAL INC.
DERRICK AND SALVAGE DEPARTMENT
TWO PENNSYLVANIA PLAZA, NEW YORK, N.Y. 10001
CABLE: RAYMONDINT
(212) 790-1830

This agreement made this 12th day of August 1968 by and between RAYMOND INTERNATIONAL INC., DERRICK & SALVAGE DEPARTMENT, Two Pennsylvania Plaza, New York, New York 10001 hereinafter called "RAYMOND" and PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES INC. (Joint Venture), 120 County Rd. (P.O. Box 217) Tenafly, New Jersey 07670, hereinafter called "KIEWIT-SLATTERY."

WITNESSETH:

1) Raymond agrees to furnish the hoisting services of the floating "A" [illegible]me Derrick CENTURY, as and when available, fueled and manned [illegible] Raymond's standard operating crew and equipped with Raym[illegible]'s standard complement of slings and gear to work as an auxiliary hoist to Kiewit-Slattery's plant and equipment at the Jamaica Bay Cross Bay Bridge site to perform the services set forth in Paragraph 2 hereof subject to the rates, terms and conditions stated hereinafter.

2) Raymond will tow, deliver to and moor at the site three times, the derrick CENTURY with a certificated maximum hoisting capacity of 700,000 Lbs. at a reach of forty feet over the side of the derrick's hull to hoist 256 pre-stressed concrete girders and 18 steel I-beams from within direct reach of the derrick's tackle from open seaworthy deck scows with suitable stability characteristics, provided and placed by you alongside the derrick CENTURY, each unit not to exceed with lifting gear 700,000 Lbs. total weight per lift, then land the girders within direct reach of the CENTURY'S tackle one time as directed by Kiewit-Slattery on existing foundation piers. The landing of each beam will be considered complete when the hoisting gear is released.

BEST COPY AVAILABLE

PLAINTIFF'S EXHIBIT 1

3) Raymond will supply with each derrick not less than four standard equipment anchors, four standard wire anchor lines and the customary deck lines. Kiewit-Slattery will supply, without cost to Raymond, all other special anchors, pile dolphins, mooring buoys, wire and/or manila rope lines, or other types of equipment required for the operation.

4) Kiewit-Slattery will remove all piles and/or other obstructions including existing bottom soil above and/or underwater, without cost to Raymond, to an extent required to permit safe operation of the derrick free afloat. Kiewit-Slattery will not require Raymond to moor the derrick by means of anchors in any pipeline or cable area or pass under any overhead powerline or structures of insufficient height to safely accommodate its passage.

5) Raymond will man the derrick at the site with a standard operating crew on normal working days Monday to Friday, inclusive, between the hours of 8 AM - 12 noon and 1 PM to 5 PM regardless of wind and weather.

Should the crew and/or the derrick at any time be engaged at work outside the hours of 8 AM and 5 PM or during lunch hour or on Saturdays, Sundays and Holidays, Kiewit-Slattery will pay Raymond for the additional time at the premium rate of $358.00 per hour or part thereof. For service on Saturdays, Sundays and Holidays, Kiewit-Slattery will guarantee a minimum of eight hours employment. All premium time shall be the subject for negotiation between the parties at the termination of the job.

6) All orders for premium time service shall be given in writing signed by an authorized representative of Kiewit-Slattery to the derrick Captain. All charges for premium time shall be paid to Raymond by Kiewit-Slattery on presentation of invoice additional to the agreed base price of this contract.

7) Should a derrick be assigned in response to Kiewit-Slattery's orders, be delivered to the site and available to

PLAINTIFF'S EXHIBIT 1

7 - cont.

Kiewit-Slattery for service and for any reason not under Raymond's control not employed to hoist girders, Kiewit-Slattery will pay Raymond a per diem stand-by fee for each normal work day the derrick is unable to hoist girders. The per diem stand-by charges shall be assessed in addition to the agreed base price and will be paid by Kiewit-Slattery to Raymond on presentation of invoice in accordance with the following schedule of rates:

CENTURY	-	$2,500.00 per normal work day

7(a) Raymond may, without penalty, remove the CENTURY from the site twice during the month of September 1968 for the time period necessary to fulfill a commitment made precedent to this agreement. Raymond shall give Kiewit-Slattery seven calendar days notice prior to the firm dates the CENTURY will tow, at Raymond's expense, from the job site and on that date Raymond shall advise Kiewit-Slattery of the firm date the CENTURY will be returned to the job site, wind and weather permitting. It is understood that the time period stated above shall not exceed five normal working days in each instance.

Raymond will undertake to find employment for the CENTURY in its normal trade during periods of such idle time as may develop thereby reducing idle time costs to Kiewit-Slattery for idle time as provided in paragraph 7. Kiewit-Slattery will release the CENTURY on application by Raymond to perform work in its normal trade if the release shall not adversely effect Kiewit-Slattery's hoisting schedule as determined by Kiewit-Slattery.

8) Kiewit-Slattery will furnish any and all special fittings, lifting devices, strongbacks and slings required for hooking-on to and hoisting within direct reach of the derrick's tackle, the various girders, together with all labor for slinging, guiding into place, securing the members as hoisted in place and casting off of slings and lifting

- continued -

PLAINTIFF'S EXHIBIT 1

8 - cont.

devices without cost to Raymond. Should any agency and/or labor union require additional labor to man the operation of the derrick, such labor will be furnished by Kiewit-Slattery, without cost, liability or responsibility to Raymond.

9) Kiewit-Slattery will indemnify, defend and save Raymond, its vessels, agents and employees, harmless against any loss, liability, damage or expense (including reasonable attorney's fees and court costs) arising from, suffered, or incurred in connection with any claim for injury to persons or property resulting in whole or in part from the failure or insufficiency of facilities and/or equipment or any other property owned, furnished or installed by Kiewit-Slattery and/or its servants, agents and employees. Kiewit-Slattery will also indemnify, defend and save harmless Raymond, its vessels, agents and employees, harmless against any loss, liability or expense arising from, suffered or incurred as a result of any act of omission by Kiewit-Slattery and/or Kiewit-Slattery's agents or employees.

10) Towing: All tugboats, with sufficient Tower's Liability and/or launch services required at the site to moor, unmoor, shift and service the derrick, barges, and transport crews, shall be furnished by Kiewit-Slattery, without cost to Raymond. Raymond will tow each derrick to and from the site twice. Subsequent tows to and from the job site to suit Kiewit-Slattery's schedule shall be made by Raymond at cost as invoiced by tugboat operator, plus 10% payable by Kiewit-Slattery to Raymond on presentation of invoice in addition to agreed base price of this contract.

11) As it is intended that in the performance of this work at the job site you will exercise complete direction and supervision of the operation and movements of our aforesaid derrick, Kiewit-Slattery will indemnify and save harmless Raymond, its vessels, agents and employees against all liabilities for loss and/or damage to property, including cargo and vessels or for personal injury or death to any persons whatsoever (including reasonable attorney's fees and court

PLAINTIFF'S EXHIBIT 1

11 - cont.

costs) arising out of the performance of said work, except such loss or damage, injury or death resulting from the sole negligence of Raymond.

12) It is expressly agreed and understood that Raymond assumes no liability to Kiewit-Slattery, its principal, agent, contractor, subcontractors or others concerned for any delay, or costs arising therefrom, because of mechanical breakdown or other causes which may render a derrick unusable or unavailable for or during performance of the stated services.

13) Raymond shall provide and maintain Workmen's Compensation and Employers Liability insurance as required by law of an employer, and Comprehensive General Liability as required by contract. Raymond shall name Kiewit-Slattery as assured in both Raymond Marine Risk and Heavy Lift Liability policies. Raymond shall furnish Kiewit-Slattery as evidence of insurance cover notes or certificates of insurance.

14) Kiewit-Slattery agrees to pay Raymond for the services of the CENTURY the base price of $300,000.00 in addition to such other charges as set forth herein which may have accrued. The base price shall become due and payable in installments ten days from presentation of invoice by Raymond following completion of each period of work, as set forth in the following schedule:

26 August 1968 to 1 November 1968 (Hoisting 136 T Members plus 11 Cantilever Members)	$175,000.00
19 days January 1969 (Hoisting 51 T Members plus 11 Cantilever Members)	$ 75,000.00
17 days Summer 1969 (Hoisting 47 T Members plus 18 I-Beams)	$ 50,000.00

Should the scheduling or apportionment of the work vary from that set forth above, Raymond and Kiewit-Slattery may, as mutually agreed, change the schedule of payments (but not the total base price) appropriately.

PLAINTIFF'S EXHIBIT 1

15) One-fourth of the agreed base price shall be deemed earned when Raymond shall have initially placed a derrick at the job site, available for service to Kiewit-Slattery. If, for any reason not under Raymond's control, Raymond's services are terminated before the specified number of members are erected, Kiewit-Slattery shall pay Raymond: FIRST, either one-half of the agreed base price or $3,000.00 per calendar day for the CENTURY for each day the derrick was employed hoisting members at the job site (regardless of the number of members placed on foundations), whichever is the greater, but in no case more than the agreed base price; and SECOND, whatever charge set forth herein as additional to the base price may have accrued.

The attachment hereto of specific provisions of this agreement between Raymond and Kiewit-Slattery is for the purposes of emphasis or to comply with applicable law or regulations and is not to be construed as an exclusion of other provisions of this agreement.

In witness whereof, the parties hereto have executed this agreement by their proper officers or duly authorized agents.

PETER KIEWIT SONS' COMPANY-
SLATTERY ASSOCIATES INC.
(Joint Venture)

BY________________(L.S.)
Robert Denny
District Manager
Title

RAYMOND INTERNATIONAL INC.
Derrick & Salvage Department

BY________________(L.S.)
Charles F. Woods,
Vice President
Title

PLAINTIFF'S EXHIBIT 2.

Form 52-2M-12-66

MATERIAL CONTRACT

Job Number Cross Bay 2-1

THIS AGREEMENT, made this 8th day of May 1968, by and between

Bayshore Concrete Products Corporation, P.O. Box 230
(Seller's Name and Address)

Cape Charles, Virginia, hereinafter called the Seller, and

Peter Kiewit Sons' Co. - Slattery Associates, Inc. (JV), P.O. Box 127
(Contractor)

Rockaway Beach, New York 11693, hereinafter called the Contractor, WITNESSETH:

Section 1. The Seller agrees to furnish all material set forth in "Section 2" hereof necessary in the construction of Cross Bay Parkway Bridge, CBB-3 (Name of Project) for Triborough Bridge & Tunnel Authority (Owner) hereinafter called the Owner, at New York, New York (Location of Project), in accordance with the terms and provisions of the Contract between the Owner and the Contractor, dated December 7, 1967, and the General and Special Conditions, Drawings and Specifications prepared by Blauvelt Engineering Co. (Architect or Engineer), hereinafter called the Architect or Engineer, forming a part of the Contract between the Contractor and the Owner, all of which shall be considered part of this Agreement by reference thereto, and the Seller agrees to be bound to the Contractor by the terms and provisions thereof.

Section 2. It is agreed that the materials to be furnished by the Seller are as follows:

Quantity	Material	Unit Price
L.S.	Item 100MB - All Prestressed Concrete Superstructure Box Beams	$62,000.00
L.S.	Item 100MI - All Prestressed Concrete Superstructure I-Beams	$69,000.00
L.S.	Item 100MS - All Prestressed Concrete Superstructure T-Girders	$3,878,000.00
13,500 L.F.	Item 85PC24 - 24" Prestressed Concrete Piles	$8.00

See Section 2 - continued

PLAINTIFF'S EXHIBIT 2

All material furnished under this Agreement is to be delivered F.O.B. **Contractor's scows at Seller's plant, Cape Charles, Virginia**

with freight allowed to ----------------------

Section 3. The Contractor agrees to pay the Seller for the materials to be furnished, as aforesaid, the sum of See Exhibit A Dollars ($-----------), subject to additions and deductions for changes as may result from operation of Contractor's contract with Owner, in monthly payments, as follows:—on or about the ---------------- day of each month -------% of the value of materials incorporated in the construction and/or delivered prior to the -------------------- day of said month, as estimated by the Architect or Engineer, less the amount of all payments previously made hereunder, and for which Contractor has received payment; and upon complete performance of this Agreement by the Seller and approval and acceptance of the Seller's materials by the Architect or Engineer, the Contractor shall make final payment to the Seller of the balance due him, within --------------- days after such approval and acceptance has been had. No payment on account shall operate as an approval and acceptance of materials furnished, or any part thereof. Discount Terms: --------% if paid within --------- days.

3 copies of invoices shall be mailed to **Peter Kiewit Sons' Co. - Slattery Associates, Inc. (JV) P.O. Box 127, Rockaway Beach, New York 11693**

All invoices received after the last day of the current month will go into the next month's account.

The Contractor may deduct from any amounts due or to become due to the Seller, any sum or sums owing by the Seller to the Contractor; and in the event of any breach by the Seller of any part of this Agreement, or in the event of any lien, claim or other liability asserted against the Contractor, arising out of the Seller's performance hereunder, which the Seller hereby agrees to save him harmless from and indemnify him against, the Contractor shall have the right to retain out of any payments due or to become due to the Seller an amount sufficient to completely protect the Contractor from damage resulting therefrom, until the situation has been completely eliminated or adjusted by the Seller.

(OVER)

JOB OFFICE COPY

PLAINTIFF'S EXHIBIT 2

Section 4. The amount of all additions and reductions to be made to or from the amount of the contract price shall be agreed upon in writing by the parties hereto, such agreement not being valid unless signed by officers or other authorized representatives of the Contractor. In case of disagreement between the parties hereto as to additions or reductions the same shall be determined by the Architect or Engineer by certificate in writing, before any such changes in materials are made, otherwise no allowance therefor shall be made.

Section 5. The seller agrees to furnish the materials called for under this Agreement within the following time or times, to-wit:

....

SEE REVISED SECTION 5 ....

....

....

and upon his failure so to do the Seller shall pay to the Contractor, as liquidated damages and not as a penalty, the sum of $.................. per day for each and every day of delay, and the payment shall not release the Seller from his obligation to fully perform this Agreement.

No allowance of an extension of time, for any cause whatever, shall be claimed by the Seller or to be made to him, unless the Seller shall have made written request upon the Contractor for such extension, within forty-eight hours after the cause for such extension occurred, and unless the Contractor and Seller have agreed in writing upon the allowance of additional time to be made. If such extension of time is requested as aforesaid and the Contractor and Seller cannot agree thereupon, the Architect or Engineer shall determine by certificate in writing what, if any, extension of time shall be allowed.

No allowance of an extension of time shall, in any event, be made to the Seller, for delay by the Seller in preparing his drawings, or in securing approval of the Architect or Engineer thereto when such drawings are not properly prepared for approval of the Architect or Engineer, or when the Seller by the exercise of reasonable diligence or good business judgment could have anticipated and avoided the delay. All drawings of the Seller must be submitted for approval of the Architect or Engineer through the Contractor's office.

Section 6. In the event the Seller fails to comply with the provisions herein and the failure is not corrected within five days after written request by the Contractor to the Seller, the Contractor may, without prejudice to any other right or remedy, furnish or secure elsewhere the necessary materials to remedy the situation, at the expense of the Seller.

Section 7. The Seller shall provide and maintain Workmen's Compensation and Employees' Liability Insurance for the protection of his employees, as required by law of an employer. The Seller shall also provide and maintain in full force and effect during the term of this Material Contract, insurance (including but not limited to insurance covering the operation of automobiles, trucks and other vehicles) in a company satisfactory to the Contractor, protecting the Seller, the Owner and the Contractor against liability from damages because of injuries, including death, suffered by persons other than employees of the Seller and liability from damages to property, arising from and growing out of the Seller's operations in connection with the performance of this Material Contract.

Such insurance covering personal injuries or death shall be in the sum of not less than $100,000.00 for one person and not less than $200,000.00 for a single accident, and the insurance covering damage to property shall be in the sum of $100,000.00 for one accident and $200,000.00 aggregate. Written proof satisfactory to the Contractor of compliance with the requirements of this section shall be furnished upon request to the Contractor before starting delivery of material.

Section 8. The Seller further obligates himself to the Contractor in the following respects, to-wit: (a) The Seller shall indemnify the Contractor against and save him harmless from any and all claims, suits or liability for infringement or violation of any patent or patent right, arising in connection with this Agreement and anything done thereunder. (b) The Seller shall indemnify the Contractor against and save him harmless from any and all claims, suits or liability for injuries to property, injuries to persons including death, and from any other claims, suits or liability, on account of any act of omission of the Seller, or any of his officers, agents, employees or servants. (c) The Seller shall pay for all materials furnished and labor performed under this Agreement, and shall satisfy the Contractor thereupon whenever demand is made, and shall indemnify the Contractor and the Owner against and save them and the premises harmless from any and all claims, suits, or liens therefor, by others than the Seller. (d) The Seller warrants and guarantees the materials covered by this Agreement, and agrees to make good, at his own expense, any defect in materials which may occur or develop prior to the Contractor's release from responsibility to the Owner therefor. (e) The Seller, in addition to the obligations set forth in this Agreement, assumes toward the Contractor all the obligations and responsibilities that the Contractor assumes toward the Owner, as set forth in the Contract, General and Special Conditions, Drawings and Specifications hereinabove referred to, insofar as applicable, generally or specifically, to the materials to be furnished under this Agreement.

And the Seller shall indemnify the Contractor and the Owner against, and save them harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any of the aforesaid matters.

Section 9. The Seller must obtain and pay for all permits, licenses, tests and official ~~inspections~~ MKB necessary to his performance **under this Agreement, and shall comply with all laws, ordinances and regulations** bearing on the production of his material and the delivery thereof.

PLAINTIFF'S EXHIBIT 2

Section 10. The Seller shall not assign or sublet this contract or any part thereof without the written consent of the Contractor.

1. The Seller agrees to submit to the Contractor a proposed progress schedule prior to the manufacture of the precast units and weekly progress reports as the work progresses.

2. The Seller agrees to comply with the provisions of Exhibit C

3. The Seller shall furnish all required shop drawings and the manufacture of the precast units shall not begin until approved shop drawings are returned to the Seller.

4. The Seller's attention is drawn to the allowable tolerances in the specifications. Any costs incurred by the Contractor by reason of the Seller's violation of these tolerances will be to the Seller's account.

Additional Provisions:

IN WITNESS WHEREOF, the parties hereto have executed this Contract by their proper officers or other authorized representatives.

Peter Kiewit Sons' Co. - Military Associates, Inc. (JV)

By .... Contractor

Bayshore Concrete Products Corporation

By .... Seller

PLAINTIFF'S EXHIBIT 2

Material Contract Between Bayshore Concrete Products Corp.
and
Peter Kiewit Sons' Co. - Slattery Associates, Inc. (J. V.)

Section 2 - Continued

It is agreed that the Seller will furnish all material embedded into the prestressed items. Not included are such items as bearing pads, bearing assemblies and teflon materials. The Seller will furnish all the Bridge Drain Assemblies - Type A (Item 13BA) and Type B (Item 13BB) with the exception of the 6" diameter galvanized W.I. pipe, internal pipe nipple and drain grate.

If the Contractor requires the cantilevered beams to be constructed with concrete of higher than designed strength, the Seller will receive from the Contractor additional compensation as follows:

Up to 5,250 p.s.i.	$0.40 per C.Y.
5,250 to 5,500 p.s.i.	$0.90 per C.Y.
5,500 to 5,750 p.s.i.	$1.55 per C.Y.
5,750 to 6,000 p.s.i.	$2.30 per C.Y.

It is agreed that the Seller will furnish the blocking and tiedown material and secure the items for shipment at the following rates:

24" concrete piles	$10.00 per pile
Prestressed box beams	$20.00 per beam
Prestressed I beams	$20.00 per beam
Cantilevered T beams	$200.00 per beam
All other T beams	$125.00 per beam

A 90% credit will be given on the above rates if all blocking and tiedown material returned to Cape Charles can be reused for succeeding shipments of similar pieces.

Beams will be transported on flat deck scows.

Contractor will provide any necessary scow reinforcement or dunnage for load distribution. If necessary, Seller may weld eyes to scows for tiedowns.

PLAINTIFF'S EXHIBIT 2

All Liability of the Seller for handling and transportation terminates on the removal of the scow from the Seller's dock or on approval of the loading and securing for shipment by the Contractor or his representative.

It is agreed that the Contractor will take delivery of eleven of the cantilever girders prior to casting the remaining eleven.

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For Items 160MB, 160MI, and 160MS where the reinforcing extends from the precast unit its extended length will be limited to the length shown on the plan or the proper lap length whichever is lesser.

If the Seller alters the design in such a manner that increases the amount of concrete and reinforcing steel to be installed by the Contractor, the Contractor shall be paid by the Seller an amount of $45.00 per cubic yard of concrete and $~~0.25~~ 0.175 MOB per pound of reinforcing steel for the increased amounts.

The price of $45.00/C.Y. for concrete applies only to:

1. Cover over the post-tensioned members ANCHORS
2. Stub interior diaphragms in the transition girders and I-beams.
3. Extension of the end diaphragms through the end block area in the I-beams MWB

The price of $~~0.25~~ 0.175 MOB per pound for the reinforcing includes furnishing, placing and tying only. The transverse steel extending from the end diaphragms and stub interior diaphragms that is to grouted in place because of changes made by the Seller shall be installed and grouted in place by the Seller.

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PLAINTIFF'S EXHIBIT 2

EXHIBIT A

The Contractor agrees to pay the Seller for the materials to be furnished, in accordance with the sums set forth in Section 2, subject to additions and deductions for changes as may result from operation of Contractor's contract with Owner as follows:

1. For precast units completed and approved at the Seller's casting yard - 45% of the value within ten days after receipt of payment by the Contractor from the Owner.

2. For precast units completed, approved and loaded on Contractor's scows - 30% of the value within ten days from date of shipment.

3. For precast units completed, approved and accepted in place by the Owner - 25% of the value within 10 days after receipt of payment by the Contractor from the Owner.

For payment purposes the value of the precast units are hereby established as follows:

Item 160MB			
28 each	@ $2,214.29/ea.	Total	$62,000.12
Item 160MI			
60 each	@ $1,150.00/ea.	Total	$69,000.00
Item 160MS			
Simple Tees - 226 ea. -	@ $8,883.85/ea.	=	$2,007,750.10
Cantilever Tees - 22 ea. -	@ $27,141.82/ea.	=	$ 597,120.04
Transition Tees - 21 ea. -	@ $12,910.94/ea.	=	$ 271,129.74
		Total.	$2,875,999.88

PLAINTIFF'S EXHIBIT 2

Item 85PC24 - $8.00/lin. ft.

In the event materials are ordered and manufactured in accordance with the plans and specifications and subsequent changes beyond the Seller's control make these materials not required the Seller is to be paid in full at the above unit prices for such materials and additionally the Contractor agrees to take delivery of such material or reimburse the Seller the cost of disposing of such material.

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PLAINTIFF'S EXHIBIT 2

REVISED SECTION 5

The Seller agrees to furnish the materials called for under this Agreement within the times set forth in Exhibit B and upon his failure to do so the Seller shall pay to the Contractor, as liquidated damages and not as a penalty the sum of $1,000.00 per day for each day of delay provided that the Contractor is assessed such liquidated damages by the Owner and it is clearly established that the Seller's delay is entirely responsible for such an assessment by the Owner. The Payment of such liquidated damages shall not release the Seller from his obligation to fully perform this Agreement.

No allowance of an extension of time, for any cause whatever, shall be claimed by the Seller or to be made to him unless the Seller shall have made written request upon the Contractor for such extension, within five days after the cause for such extension occurred, and unless the Contractor and Seller have agreed in writing upon the allowance of additional time to be made. If such extension of time is requested as aforesaid and the Contractor and Seller cannot agree thereupon, the Architect or Engineer shall determine by certificate in writing what, if any, extension shall be allowed.

No allowance of an extension of time shall, in any event, be made to the Seller, for delay by the Seller in preparing his drawings, or in securing approval of the Architect or Engineer thereto when such drawings are not properly prepared for approval of the Architect or Engineer, or when the Seller by the exercise of reasonable diligence or good business judgment could have anticipated and avoided the delay. All drawings of the Seller must be submitted for approval of the Architect or Engineer through the Contractor's office.

If an extension of time is requested, the Seller shall be entitled to such extension of time for delay caused solely by the reasons cited in Article 13 of the Triborough Bridge and Tunnel Authority Specifications for the Cross Bay Parkway Bridge, Contract CBR-3.

PLAINTIFF'S EXHIBIT 2

EXHIBIT B

It is agreed that the Seller will furnish and the Contractor will accept delivery of the prestressed beams in accordance with the following schedule:

1. By October 7, 1968

T Beams for Piers 4 to 14	110 each
T Beams for Piers 20A to 24A	26 each

2. By September 15, 1968

Cantilever T-beams north of channel	11 each

3. By December 15, 1968

T-beams for Piers 17 to 19AB	26 each
T-beams for Piers 19AB to 20A	6 each
T-beams for Ramp NSE, Piers 24C to 25C	4 each
Transition beams for Ramp NW, Piers 24D to 25D	4 each
Cantilever T-beams south of channel — 14 weeks after delivery of the first 11	11 each
Drop in T-beams	11 each

4. By November 1, 1968

Transition beams for Piers 24A to 25A	9 each
Transition beams for Ramp NSE, Piers 25C to 26C	4 each
I-beams for Ramp SN	12 each
I-beams for Ramp NW, Pier 25D to Abutment D	18 each
I-beams for Ramp NSE, Pier 26C to 27C	6 each
I-beams for Ramp EN, Pier 27B to Abutment B	6 each
Box beams for Ramp SN	7 each
Box beams for Ramp SW	7 each
Box beams for Pedestrian Ramp	6 each
Box beams for Ramp NSE, Piers 27C to 28C	8 each

PLAINTIFF'S EXHIBIT 2

5. By August 1, 1969 - All remaining beams

6. The T-beams are to be manufactured in such a sequence that delivery can start with the beams that span piers 4 and 5 and progress southward consecutively.

7. The Seller agrees to so schedule his casting operations that he shall have ready by August 1, 1968 79 each of the simple T-beams.

PLAINTIFF'S EXHIBIT 2

EXHIBIT C

The following required contract provisions are called to your attention and become a part of this subcontract:

1. The contractor shall insert in each of his subcontracts all of the stipulations contained in these Required Contract Provisions and also a clause requiring his subcontractors to include these Required Contract Provisions in any lower tier subcontracts which they may enter into, together with a clause requiring the inclusion of these provisions in any further subcontracts that may in turn be made. The Required Contract Provisions shall in no instance be incorporated by reference.

2. Selection of Subcontractors, Procurement of Materials, and Leasing of Equipment.

   During the performance of this contract, the contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor"), agrees as follows:

   (a) Compliance With Regulations: The contractor will comply with the Regulations of the Department of Commerce relative to nondiscrimination in Federally-assisted programs of the Department of Commerce (Title 15, Code of Federal Regulations, Part 8, hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

   (b) Nondiscrimination: The contractor, with regard to the work performed by it after award and prior to completion of the contract work, will not discriminate on the ground of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate either directly or indirectly in the discrimination prohibited by Section 8.4 of the Regulations, including employment practices when the contract covers a program set forth in Appendix A-II of the Regulations.

BEST COPY AVAILABLE

PLAINTIFF'S EXHIBIT 2

(c) Solicitations: In all solicitations either by competitive bidding or negotiation made by the contractor for work to be performed, under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor, supplier, or lessor shall be notified by the contractor of the contractor's obligations under this contract and the Regulations relative to nondiscrimination on the ground of race, color or national origin.

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(d) Information and Reports: The contractor will provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the State Highway Department of the Bureau or Public Roads to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information, the contractor shall so certify to the State Highway Department, or the Bureau of Public Roads as appropriate, and shall set forth what efforts it has made to obtain the information.

(e) Sanctions for Noncompliance: In the event of the contractor's noncompliance with the nondiscrimination provisions of this Section II-3, the State Highway Department shall impose such contract sanctions as it or the Bureau of Public Roads may determine to be appropriate, including, but not limited to,

(1) withholding of payments to the contractor under the contract until the contractor complies, and/or
(2) cancellation, termination or suspension of the contract, in whole or in part.

(f) Incorporation of Provisions: The contractor will include the provisions of Section II-3 in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, orders, or instructions issued pursuant thereto. The contractor will take such action with respect to any subcontract, procurement, or lease as the State Highway Department or the

PLAINTIFF'S EXHIBIT 2

Bureau of Public Roads may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that, in the event a contractor becomes involved in or is threatened with, litigation with a subcontractor, supplier, or lessor as a result of such direction, the contractor may request the State to enter into such litigation to protect the interests of the State, and, in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

3. During the performance of this contract, the subcontractor agrees as follows:

(a) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and will take affirmative action to insure that they are afforded equal employment opportunities without discrimination because of race, creed, color or national origin. Such action shall be taken with reference, but not be limited, to: recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training.

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(b) The contractor will send to each labor union or representative of workers with which he has or is bound by a collective bargaining or other agreement or understanding, a notice, to be provided by the State Commission for Human Rights, advising such labor union or representative of the contractor's agreement under clauses (a) through (g) (hereinafter called "non-discrimination clauses"). If the contractor was directed to do so by the contracting agency as part of the bid or negotiation of this contract, the contractor shall request such labor union or representative to furnish him with a written statement that such labor union or representative will not discriminate because of race, creed, color or national origin and that such labor union or representative either will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of these non-discrimination clauses or that it consents and agrees that recruitment, employment and the terms and conditions of employment

PLAINTIFF'S EXHIBIT 2

under this contract shall be in accordance with the purposes and provisions of these nondiscrimination clauses. If such labor union or representative fails or refuses to comply with such a request that it furnish such a statement, the contractor shall promptly notify the State Commission for Human Rights of such failure or refusal.

(c) The contractor will post and keep posted in conspicuous places, available to employees and applicants for employment, notices to be provided by the State Commission for Human Rights setting forth the substance of the provisions of clauses (a) and (b) and such provisions of the State's laws against discrimination as the State Commission for Human Rights shall determine.

(d) The contractor will state, in all solicitations or advertisements for employees placed by or in behalf of the contractor, that all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color or national origin.

(e) The contractor will comply with the provisions of Sections 291-299 of the Executive Law and the Civil Rights Law, will furnish all information and reports deemed necessary by the State Commission for Human Rights under these non-discrimination clauses and such sections of the Executive Law, and will permit access to his books, records and accounts by the State Commission for Human Rights, the Attorney General and the Industrial Commissioner for the purposes of investigation to ascertain compliance with these non-discrimination clauses and such sections of the Executive Law and Civil Rights Law.

(f) This contract may be forthwith canceled, terminated or suspended, in whole or in part, by the contracting agency upon the basis of a finding made by the State Commission for Human Rights that the contractor has not complied with these non-discrimination clauses and the contractor may be declared ineligible for future contracts made by or on behalf of the State or a public authority or agency of the State, until he satisfies the State Commission for Human Rights that he has established and is carrying out a program in conformity with the provisions of these non-discrimination clauses. Such finding shall be made by the State Commission for Human Rights after conciliation efforts by the Commission have failed to achieve compliance

PLAINTIFF'S EXHIBIT 2

with these non-discrimination clauses and after a verified complaint has been filed with the Commission, notice thereof has been given to the contractor and an opportunity has been afforded him to be heard publicly before three members of the Commission. Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

(g) The contractor will include the provisions of clauses (a) through (f) in every subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to operations to be performed within the State of New York. The contractor will take such action in enforcing such provisions of such subcontract or purchase order as the contracting agency may direct, including sanctions or remedies for non-compliance. If the contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor shall promptly so notify the Attorney General, requesting him to intervene and protect the interests of the State of New York.

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THIRD-PARTY PLAINTIFFS' EXHIBIT M.

Lucius Pitkin
incorporated

Liberty Mutual Insurance Co.
Attn.: Mr. Robert J. Hickey

September 22, 1970
M-1788 - T.R. 6211

-5-

the strands in the loop insofar as could be tested appeared to have been satisfactory and as specified.

The load calculations indicated that the loops could have safely carried the load if the load was uniformly distributed - even if the load were carried by two loops, one at each end.

Nevertheless, the material of the strands comprising the lifting loops was satisfactory and failure occurred by loading beyond the material strength - that is, overloading. Of course, once a strand breaks, the sudden shifting of load and consequent breaking of other strands follows.

The possible causes for overloading leading to failure - presupposing that only two loops were carrying the load because of the manner in which the lifting leg used on the job site (see sketch appended) could not easily uniformly distribute the load between adjacent loops - are lifting too rapidly and thereby imposing an indeterminate but additional dynamic load or, more probably, the "home-made" design of three strands not woven together in a proper multi-stranded wire rope such that the load in the loops was not distributed uniformly or properly among the strands. Thus, any one of the three strands in a loop could be forced to carry more than its intended share of the load leading to its failure and ultimately failure of the other strands and loops.

Respectfully submitted,

LUCIUS PITKIN, INC.

E. Silkiss
Chief Metallurgist

ES/mm

3rd Party Pl.

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

M Id

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV.

Lucius Pitkin
INCORPORATED
Analytical, Metallurgical and Research Laboratories
50 HUDSON STREET, NEW YORK, N. Y. 10013 • (212) DE 3-2737
CABLE ADDRESS: NIKTIP

S. D. OF N. Y.
XXIV

TECHNICAL REPORT

REVISED

JUNE 4, 1974

T. R. No. 6211
L. P. No. M-1788
Your P. O. September 22, 1970

XXIV

Liberty Mutual Insurance Co.
393 Seventh Avenue
New York, N.Y. 10001

Attention: Mr. Robert J. Hickey

Subject: FAILED LIFTING LOOPS
Your Ref.: Raymond International-Bayshore Products
P-214-11-821

INTRODUCTION:

Two failed lifting loops were submitted to the LPI laboratories for metallurgical examination. We were advised that the loops had failed while lifting a 130-ton pre-fabricated concrete bridge section.

Four loops, two at each end had been embedded in the concrete when the section was cast. These loops had been secured to a lifting beam and thence to a derrick crane for lifting and placement. We were advised that one loop had failed first followed by rupture of the adjacent loop at the same end. Then with the load unsupported at one end, failure of the two loops at the other end followed. The two loops submitted were the adjacent loops that failed first.

As part of the background information, specifications for 7/16 in. and 1/2 in. wire used in making the loops and diagrams of the lifting apparatus used on job site and in the manufacturers plant were submitted. Copies are appended.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

OBJECT:

The purpose of this examination is to determine, if possible, the probable cause of failure of the subject loops.

PROCEDURE AND OBSERVATIONS:

A. Visual Examination

As received, the loops were U-shaped with an overall end-to-end length of 29 and 33 inches. Each loop was covered with a protective sheath approximately 22 inches long. Inside, the loop was composed of three strands, with each strand made up of seven wires. The sheathing on the inner bend of one loop arbitrarily designated "A" contained a jagged, longitudinal rupture approximately 16 in. long with a transverse crack propagating from the longitudinal crack at about the center of the bend. One end of each loop showed cup and cone failures characteristic of a tough, ductile material; the other endshad been torch cut to remove the loop from the concrete where they were still embedded.

In general, the surface of the wires comprising the strands were lightly rusted and exhibited a white adhering substance, apparently concrete. Fig. 1 is a photograph showing the submitted loops in the as-received condition.

Individually, the loops consisted of three strands, two of which were nominally of 7/16-in. diameter-7 wire construction and one 1/2-in. diameter-7 wire construction. The strands were merely laid side by side to each other and did not comprise a standard rope construction.

Close examination of the fractures failed to reveal the presence of any secondary cracks or visual defects associated with the fractures. Fig. 2 is a close-up photograph showing the wire fracture surfaces. It can be seen that deformation or "necking down" of the wire diameters had occurred at the fracture surfaces before final failure occurred.

B. Wire Diameter Measurements

The sheath from each loop was removed and one strand from each loop was arbitrarily selected for diameter measurements.

The strand selected and arbitrarily identified as A2 had a nominal diameter of 7/16 in. Diameter measurements of individual wires which are shown below indicated the center wire to be larger than the outer six wires as is required for Uncoated 7-Wire Stress-Relieved Strand for Pre-Stressed Concrete per ASTM Designation: A-416-68. The outer six wires exhibited a uniform and essentially the same diameter.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

Similar measurements were made on a strand from loop B arbitrarily marked B2. This strand had a nominal diameter of 1/2 in. The center wire was again larger than the outer six wires.

Results of the wire diameter measurements are tabulated below:

WIRE DIAMETERS (inches)

	CENTER WIRE	OUTER WIRES 1	2	3	4	5	6	Grade 270 Min. Difference Ce ter Wire t Outer Wir
LOOP A-STRAND A2	0.1490	0.1414	0.1417	0.1413	0.1412	0.1410	0.1410	0.0025
LOOP B-STRAND B2	0.1723	0.1666	0.1668	0.1667	0.1666	0.1664	0.1660	0.0030

C. Tensile Test

Two wires each from strand A2 and B2 were tensile tested to determine the ultimate tensile strength and elongation. The results of the tests performed, which are appended, indicate the individual wires to have a tensile strength of 278,500 psi or better, which when stranded would be expected to result in a strand capable of meeting the minimum ultimate strength of 270,000 psi for ASTM: A-416 Grade 270, 7-wire uncoated stress-relieved strand.

D. Composition

Limited quantitative chemical and qualitative spectrographic analyses on wire from strand A2 and B2 indicated the wire used to be a plain, high-carbon steel commonly used for 7-wire strand. The composition of the wire was considered satisfactory.

A complete report of the analyses made is appended.

E. Hardness

A hardness survey on the transverse section of individual wires from strand A2 and B2 showed all the wires to have a more-or-less uniform hardness ranging from Rockwell C 46.5 to 49.

F. Metallographic Examination

Longitudinal specimens were cut from representative failed wires of strand A2 and B2 so as to intersect the fracture surfaces, mounted in Bakelite, carefully ground and polished for metallographic examination. A transverse section containing all seven wires was also prepared for metallographic examination.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

In the as-polished, unetched condition, the wires from both strands exhibited essentially the same amount of non-metallic inclusions. These inclusions were rated at C2, thin series silicates, in accordance with ASTM Designation: E-45. The amount of inclusions observed was considered normal.

Etching the specimens revealed the general microstructure of the wires to consist of severely distorted, uniformly tempered martensite. The surface of the wires showed some slight corrosion in the form of pitting attack and oxide or rust formation. The pitting attack did not appear to be directly associated with the fractures or to have substantially decreased the diameter of the individual wires.

Examination of the fracture surfaces revealed the presence of localized deformation and shear-like fracture profiles typical of a tough material failing in tension.

Fig. 3 is a photomicrograph showing the fracture profile of wire from strand A2. Fig. 4 is a similar photomicrograph of a wire from strand B2.

Examination of the wire surfaces at and adjacent to the fractures failed to reveal the presence of any secondary cracks, gross inclusions, laps or other defects.

Fig. 5 is a photomicrograph of a longitudinal section of a wire from loop A2 showing the elongated microstructure of tempered martensite. This distortion of the grains is a result of drawing the wire. Fig. 6 is a photomicrograph showing the general microstructure of a typical transverse section.

G. Load Calculation

Calculations based on the specification minimum strengths of the strands comprising the loops and compared with the calculated load in each loop, indicates that the loops theoretically should have been capable of sustaining the dead weight load of the prefabricated concrete beam being lifted. The calculations were made assuming, first, the load to be uniformly distributed over the four lifting loops with the lifting loops at 60 degree angles to the concrete beam and, second, assuming only one loop at each end carrying the total load. The load calculations are appended.

DISCUSSION AND CONCLUSIONS:

Results of our examination indicated the submitted loops to have failed from tensile overloading. The material making up

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

the strands in the loop insofar as could be tested appeared to have been satisfactory and as specified.

The load calculations indicated that the loops could have safely carried the load if the load was uniformly distributed - even if the load were carried by two loops, one at each end.

Nevertheless, the material of the strands comprising the lifting loops was satisfactory and failure occurred by loading beyond the material strength - that is, overloading. Of course, once a strand breaks, the sudden shifting of load and consequent breaking of other strands follows.

Respectfully submitted,

LUCIUS PITKIN, INC.

E. Silkiss
Chief Metallurgist

ES/mm

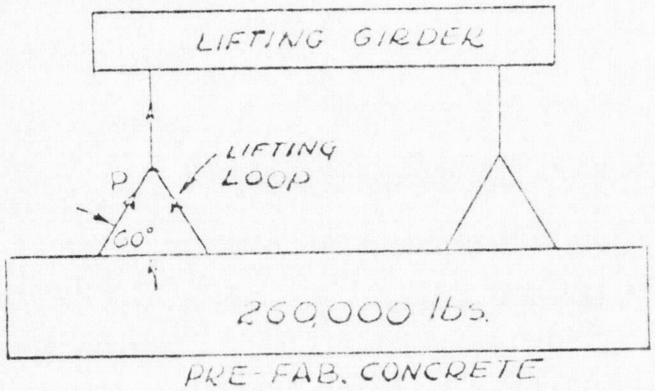
THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

LIFTING LOOP
WIRE TENSILE TEST RESULTS

	LOOP A		LOOP B	
	Strand 2 - 7/16" Dia.		Strand 2 - 1/2" Dia.	
	Original	Duplicate	Original	Duplicate
Wire diameter, in.	0.1465	0.1460	0.1665	0.1670
Ultimate load, lbs.	4,725	4,775	6,150	6,100
Ultimate tensile strength, psi	281,250	285,900	283,400	278,500
Elongation, % in 2 in.	3.5	3.0	5.5	5.5

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

LOAD CALCULATIONS



4 lifting loops - 2 at eachend of pre-fabricated beam.

60° angle measurement from failed loops.

Assume all four loops carry load equally. Load in one end of each loop calculates as follows:

260,000 lbs. total load
8 ends

32500

$$P = \frac{260{,}000}{8} \Big/ \sin 60$$

37530

= 28,200 lbs. load in one end of loop composed of 3 strands.

Each loop end of 3 strands ideally could carry minimum load as follows:

2 - 7/16" strands @ 31,000 lb = 62,000 lbs.
1 - 1/2" strand @ 41,300 lb = 41,300
Total 103,300 lbs.

37530

Thus, a load P = 28,200 lbs. is well below the minimum theoretical breaking load of 103,300 lbs. each end of the loop could carry. If, however, the embedded loops were of unequal lengths and only one loop at each end of the beam actually carried the load, then the load would

37530 75060

be twice P = 28,200 lbs or 56,400 lbs - still within apparently safe limits.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

SPECTROGRAPHIC ESTIMATES

Report No. M-1788 T.R. 6211 Date September 22, 1970

The result as indicated by our analysis of 2 sample(s) of clippings from wire strands

Submitted by:

BY QUANTITATIVE CHEMICAL AND QUALITATIVE SPECTROGRAPHIC ANALYSES

	Strand A-2	Strand B-2
Carbon, %	0.78	0.78
Manganese	0.90	0.72
Phosphorous	0.012	0.012
Sulfur	0.008	0.016
Silicon	0.27	0.30
Iron	Major	Major
Manganese	0.X	0.X
Copper	0.X low	0.0X
Chromium	0.00X	0.0X low
Aluminum	0.00X	0.00X low
Zinc	NF	0.0X low
Tin	NF	0.00X

Other elements looked for, but not found:

cadmium, indium, bismuth, antimony, arsenic, lead, cobalt, molybdenum, vanadium, tungsten, titanium, magnesium, zirconium, boron.

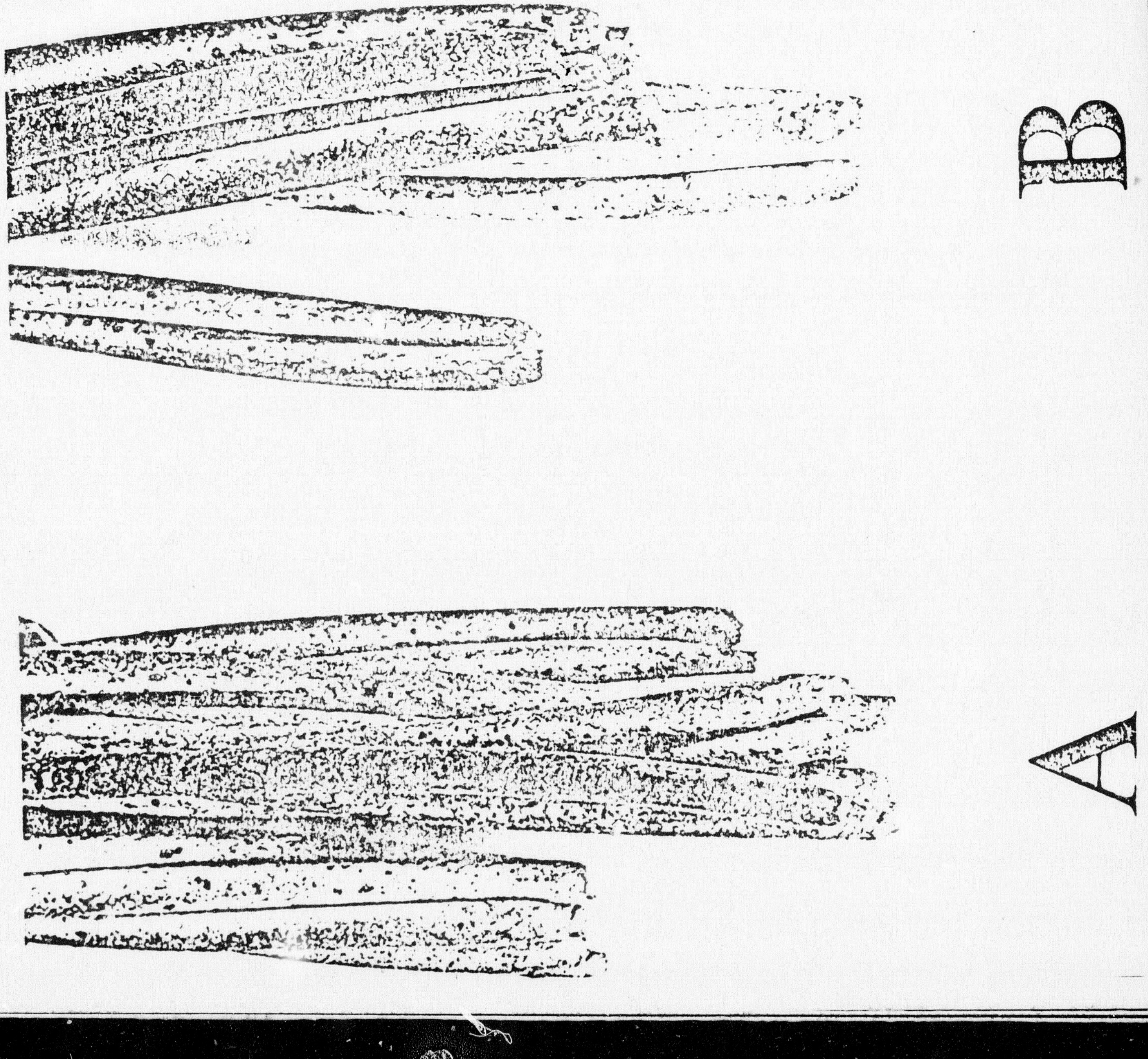
LUCIUS PITKIN, INC.

NOTE: Major = above 5% estimated. Minor = 1-5% estimated. .X, .OX, .OOX, etc. = concentration of the elements estimated to the nearest decimal place — e.g. .OX = .01-.09% estimated.
The numbers in parenthesis indicate the estimated relative concentration of the element among the various samples.
The detectability varies considerably among the elements and also depends upon the amount and nature of the sample. "Not Found" therefore means not detected in the particular sample by the technique employed. * = Less than.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

Fig. 1 SUBMITTED LOOPS, AS RECEIVED

Photograph showing the failed loops in the as-received condition. Each loop consists of three 7-wire strands, two nominally 7/16 in. diameter and the third 1/2 in. diameter – all laid side by side in a protective sheath.



THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

Fig. 2 FRACTURED STRANDS

Close-up photograph showing the wire fractures.

In general, the fractures exhibit local deformation or necking down as is characteristic of tough, ductile material which has ruptured in tensile loading beyond its strength.

The surface of the wires exhibit light corrosion and some white compound, apparently concrete.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

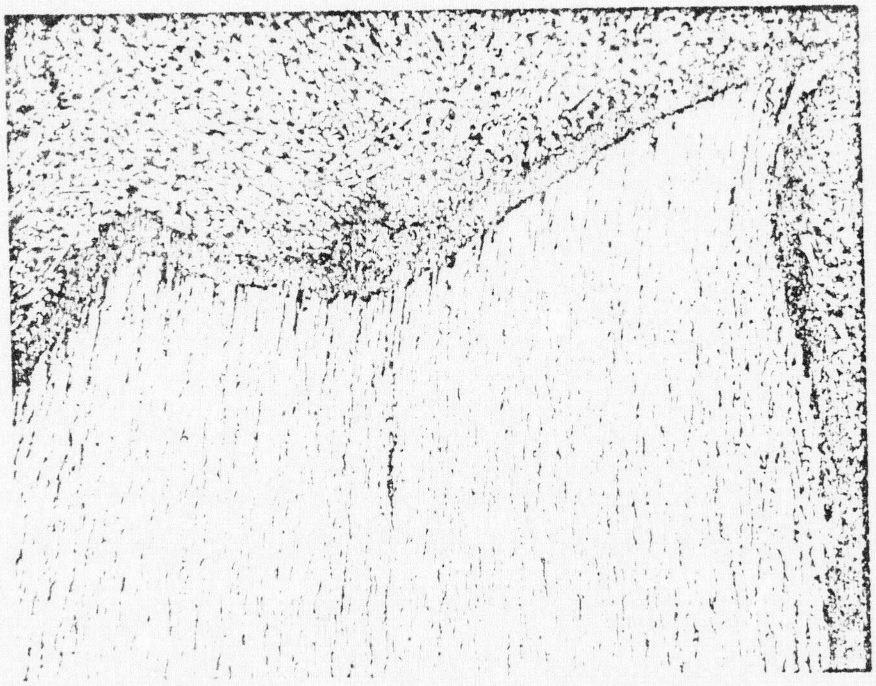


Fig. 3 MICROSTRUCTURE AT FRACTURE - STRAND A2 50 X

Photomicrograph of a longitudinal section showing a wire fracture from strand A2. The necking down of the wire diameter at the fracture and the shear-like profile is characteristic of a tough, ductile material.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

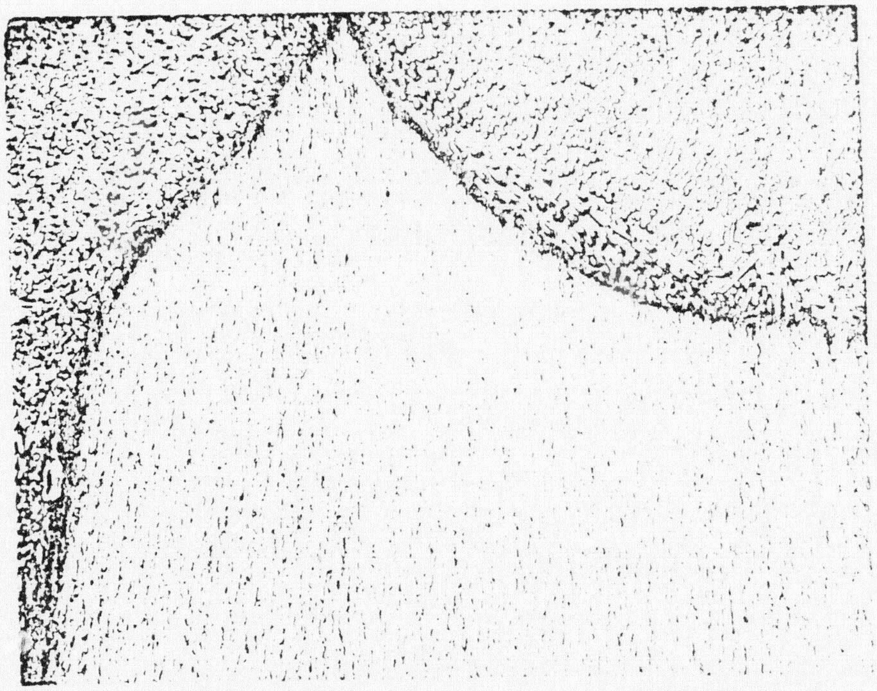


Fig. 4 MICROSTRUCTURE AT FRACTURE - STRAND B2 50 X

Photomicrograph similar to that shown in Fig. 3 except of a wire from strand B2.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

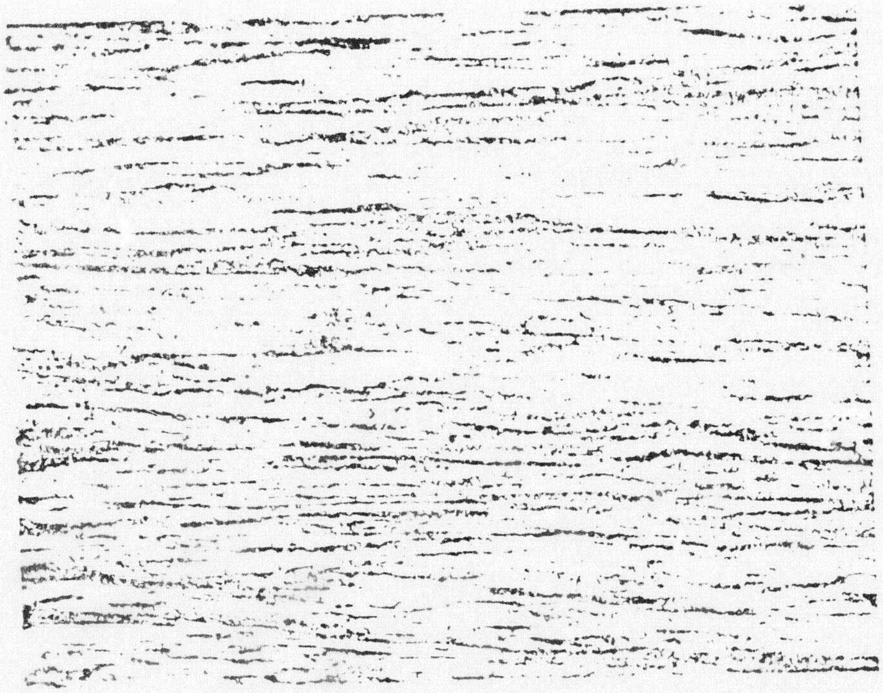


Fig. 5 LONGITUDINAL MICROSTRUCTURE 500 X

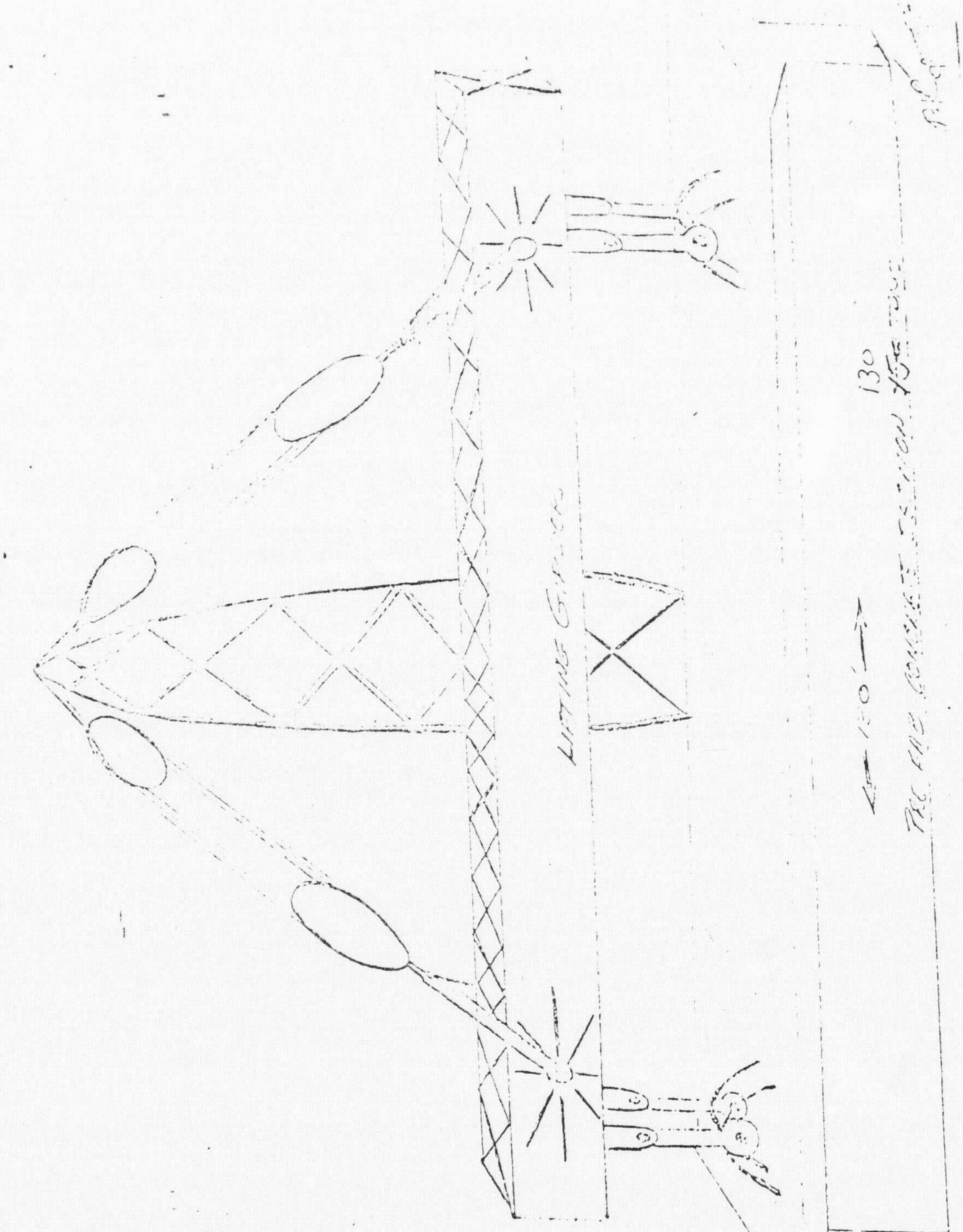
Photomicrograph showing the general microstructure of a wire from strand A2. The wire exhibits a fibrous or elongated structure of tempered martensite typical of drawn material.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

Fig. 6 TRANSVERSE MICROSTRUCTURE 500 X

Photomicrograph of a transverse section showing the general microstructure of a wire. The structure consists of uniformly tempered martensite.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV


LIFTING GIRDER
← 150' →
130
PRE FAB CONCRETE SECTION ~~150~~ TONS

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

Inspection Certificate

Uncoated Seven-Wire Stress-Relieved Strand
For Prestressed Concrete

SUZUKI METAL INDUSTRY CO., LTD.

HEAD OFFICE & AKABANE WORKS — NO. 1-18 AKABANE-KITA
KITA-KU, TOKYO, JAPAN

NARASHINO WORKS — NO. 2-750 HIGASHINARASHINO
NARASHINO, CHIBA, JAPAN

Messrs
Order No. 73054.
Quantity 5 coils 80,000 feet.
Destination Norfolk.
Inspection Date Apr. 9 , 1968
Shipping Mark
F.B.M.
N.Y.
20978
NORFOLK
270K
7/16" x 16,0 0'
HEAT NO. A-32346 A-33632
PACK NO. 1 2 - 5
MADE IN JAPAN
FEHR BROS. MANUFACTURES, INC.

P. P. Manager, Inspection Dept.

60-5-MB-4

1 Specification : 270K (Color Code Identification : Yellow Tape.)

(1) Strand

Nominal Diameter : 7/16 in. 4°
Tolerance of Diameter : ± 1/64 in.
Nominal Steel Area : 0.117 sq. in.
Construction : 1 center wire + 6 helically placed outer wire
Pitch (Length of Lay) : 12D - 16D
Breaking Strength : min. 31,000 Lbs.
Yield Strength : min. 26,350 Lbs
Elongation in 24" or up : min. 3.5 %
Nominal Weight per 1000ft : 400 Lbs.
Length per Coil ~~Reel~~ : 16,000 Feet

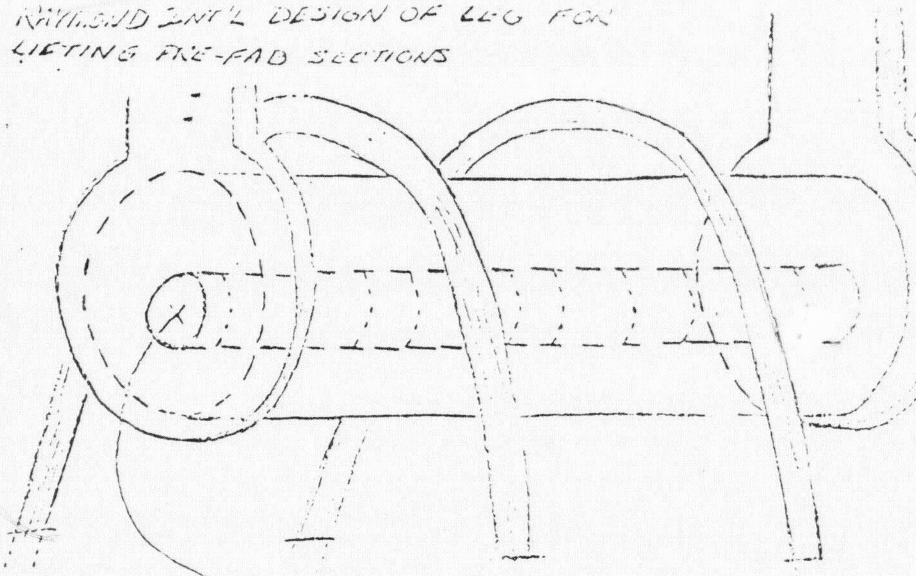
(2) Individual Wires

Difference between center wire diameter and diameter of any outer wire

: min. 0.0025 in.

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

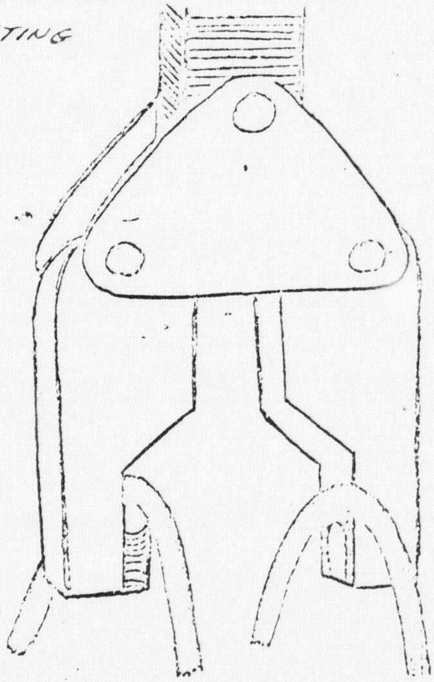
RAYMOND INT'L DESIGN OF LEG FOR LIFTING PRE-FAB SECTIONS



LIFTING APPARATUS USED AT JOB

3" PIN INSERTED THRU LEG JOINTS A "DEADNUT" UNDERNEATH LIFTING EYES. [illegible] FRAME [illegible] AROUND [illegible] LIFTING METHOD REQUIRES [illegible] VERTICAL HEIGHT OF [illegible]

BAYSHORE'S LIFTING APPARATUS



THIRD-PARTY DEFENDANT'S EXHIBIT XXIV

2 Chemical Composition (%)

Composition / Charge No.	C.	Si.	Mn.	P.	S.	Inspection No.
A-32346	0.75	0.23	0.81	0.017	0.012	07158
A-33632	0.73	0.24	0.83	0.013	0.013	17001-17004

3 Test Results

(1) Strand

ck

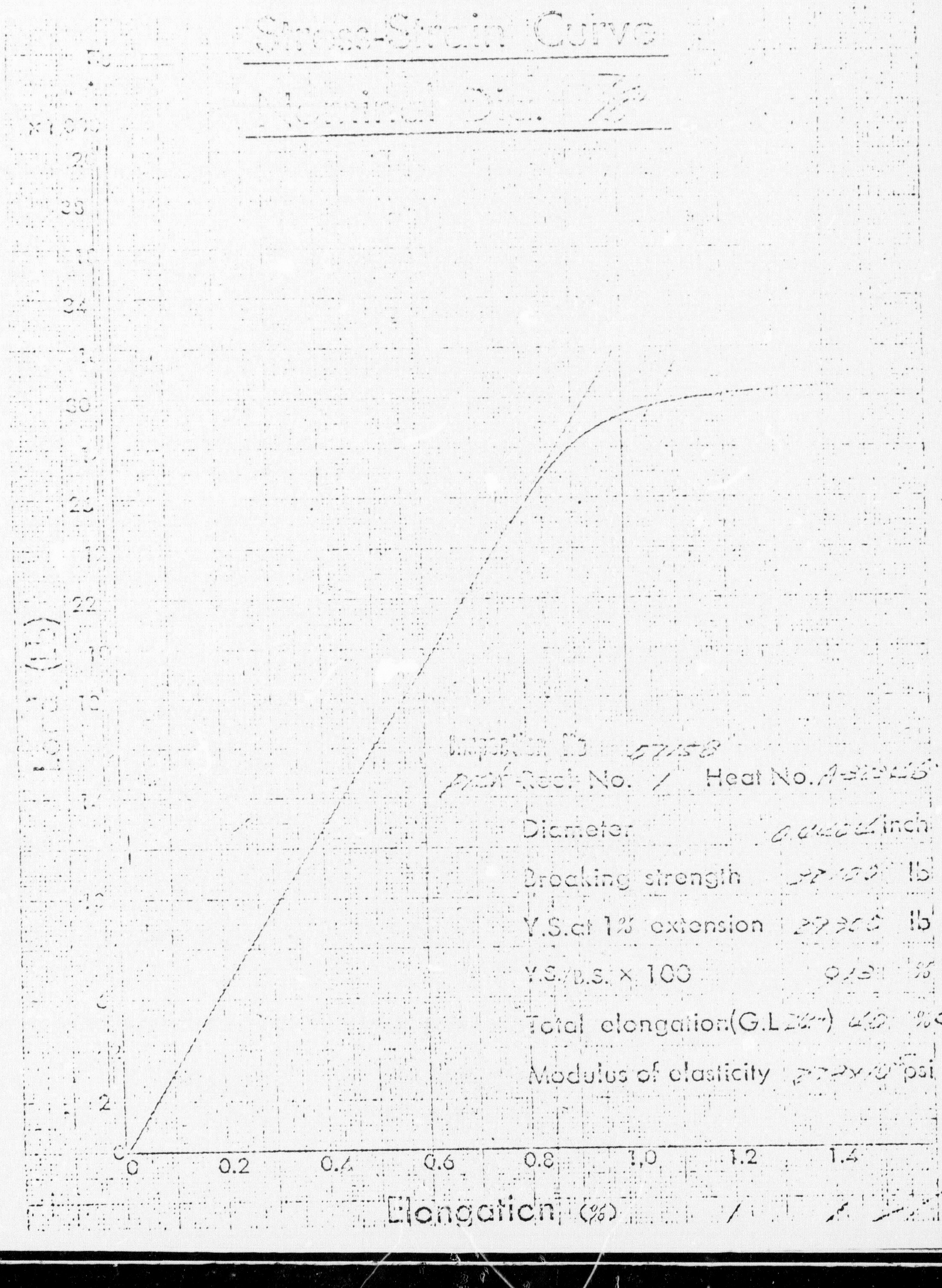
Inspection No.	Diameter in.	Area sq. in.	Pitch Time × D	Breaking Strength Lbs.	Yield Strength Lbs.	Elongation in 24" up %	Weight Per 1000 ft Lbs.
07158	0.4404	0.1173	13.55	32,100	29,300	4.0 over	403.2
17001	0.4404			31,900	29,200	"	"
17002	0.4400			31,700	29,200	"	"
17003	0.4424	0.1182	13.57	32,300	29,500	"	"
17004	0.4424			32,600	29,600	"	"

all wires
as a unit

(2) Individual Wire

Inspection No.	Center wire in.	Outer wire 1	2	3	4	5	6 in.	Difference in.
07158	0.1497	0.1457	0.1457	0.1457	0.1453	0.1453	0.1453	0.0040
17003	0.1501	0.1461	0.1461	0.1461	0.1461	0.1461	0.1461	0.0040

THIRD-PARTY DEFENDANT'S EXHIBIT XXIV



Stress-Strain Curve

Nominal Dia. 7/8"

Inspection ID 57158

Reel No. 1 Heat No. [illegible]

Diameter [illegible] inch

Breaking strength [illegible] lb

Y.S. at 1% extension [illegible] lb

Y.S./B.S. × 100 [illegible] %

Total elongation (G.L [illegible]) [illegible] %

Modulus of elasticity [illegible] psi

loop could be forced to carry more than its intended share of the load leading to its failure and ultimately failure of the other stands and loops."

(Report by Mr. Silkiss of Pitkin Associates, September 22,1970.) (Tr. 384, 385, Exh. XXIV., Exh. M.)

All parties agree that the lifting hooks which failed were coated with at least superficial rust. (Tr. 178, 179, 351-352.) Mr. Silkiss testified that this rusting was merely superficial and did not cause significant weakening of the wires. (Tr. 351-352.) Defendant Kiewit submitted testimony that after the accident substantial rust had been found on the wires beneath the concrete surface of the girder. Neither Raymond nor Kiewit allege that rusting was the primary cause of the rupture. Their position, and the court agrees, is that the lifts broke due to improper design, possibly aggravated by the rusting.

CONCLUSIONS OF LAW

Kiewit's Liability to Raymond.

Raymond argues that Kiewit is liable in the amount of $30,200, which is the cost of the temporary and permanent repairs on the barge, based on the indemnification provision in their contract and the implied warranty of fitness for use of the fittings and appurtenances which it supplied.

Kiewit contends that, since Raymond designed the lifting beam and supervised the lifting operation, there was no breach of implied warranty of fitness on the part of Kiewit. Kiewit further argues that the agreement between them did not constitute a contract of purchase or sale, but a contract whereby Raymond agreed to furnish its services to Kiewit. Further, according to Kiewit, the indemnification provision was included in order to indemnify Raymond against actions by third parties.

Kiewit is liable to Raymond under the indemnification clause of paragraph 9 of their contract as well as by virtue of an implied warranty of workmanlike service.

Paragraph 9 of the contract between Raymond and Kiewit reads as follows:

> "Kiewit-Slattery will indemnify, defend and save Raymond, its vessels, agents and employees harmless against

> any loss, liability, damage or expense (including reasonable attorney's fees and court costs) arising from, suffered or incurred in connection with any claim for injury to persons or property resulting in whole or in part from the failure or insufficiency of facilities and/or equipment or any other property owned, furnished or installed by Kiewit-Slattery and/or its servants, agents and employees. Kiewit-Slattery will also indemnify, defend and save harmless Raymond, its vessels, agents and employees, against any loss, liability or expense arising from, suffered or incurred as a result of any act of omission by Kiewit-Slattery and/or Kiewit-Slattery's agents or employees."

The indemnification clause is not, on its face, limited to claims of third parties. Raymond's claim is one of injury resulting from the failure of the lifting devices on a girder supplied by Kiewit. The accident was caused by ". . . the failure or insufficiency of equipment

. . . . furnished by Kiewit-Slattery." Accordingly, Kiewit is liable to Raymond under the contract.

Kiewit is also liable for breach of implied warranty of workmanlike service in that the hooks furnished by Kiewit for lifting of T beam 205 were unfit for their intended use.

In _Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc._, 376 U. S. 315 (1964), the Supreme Court ordered a stevedore contractor to indemnify a shipowner for damages paid to a seaman injured when a tent rope snapped. The contract between the shipowner and the stevedoring contractor provided that the stevedore would furnish equipment and supervise operations. The court held a warranty of workmanlike performance is sufficiently broad to include the stevedore's failure to furnish safe equipment under the contract. 376 U. S. at 320. The court further held that "(t)he implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment; however the issue of breach of the undertaking does not turn on whether the contractor knew or should have known that his equipment was safe, _but on whether the equipment was in fact_ *safe and fit for its intended use*." (Emphasis supplied.) 376 U. S. at 321-322. Because the rope which snapped was specifically found unfit for the purpose for which it was intended and the injury was the natural consequence of its breakage, the Court held the contractor liable.

Under the principles enumerated above in *Italia Societa*, *supra*, Kiewit, as the supplier of the defective hook, is liable to Raymond for breach of implied warranty of workmanlike service. The fact that Raymond personnel participated in the lifting operation does not alter Kiewit's liability.

Bayshore, as the manufacturer and supplier of the beam, is also liable to Raymond. Where an article is of such a character that when used for the purpose for which it was made it is likely to be a source of danger if not properly designed or manufactured, the manufacturer is strictly liable for breach of implied warranty of fitness to the persons whose use is contemplated. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592 (1963); *RESTATEMENT OF TORTS* 2d § 402A.

The defective lifting loops were an unreasonably dangerous product and were in a defective condition when sold and delivered by Bayshore. The beam reached the user (plaintiff) without substantial change in condition. The hooks failed while being used properly for the purpose for which they were intended by a user who was or should have been reasonably within the manufacturer's contemplation. Bayshore is, therefore, liable to Raymond for damages suffered as a result of this breach of implied warranty of fitness.

Bayshore's Liability to Kiewit.

Bayshore must indemnify Kiewit for damages paid to plaintiff under both the contract and the implied warranty of fitness of use.

Bayshore's contract with Kiewit provides, in Section 2, that Bayshore will "furnish all material embedded in the pre-stressed items." The contract further contains, in Section 8, an indemnification clause whereby Bayshore agreed to indemnify Kiewit for "suits arising from any act or omission of the seller." Since the defective lifting hook was the result of Bayshore's manufacture, Bayshore is obligated under the terms of the contract to indemnify Kiewit against Raymond's claims, as well as attorney's fees incurred in litigating this matter.

Bayshore also breached its implied warranty of merchantability and fitness for use with respect to Kiewit and is, accordingly, liable for any damages Kiewit is required to pay as the result of such a breach. Goldberg v. Kollsman Instrument Corp., supra.

Bayshore's Liability to Kiewit for Extra Expense in Alternate Means of Handling.

Kiewit's position is that the accident involving beam T 205 made it unreasonable for Kiewit to continue to lift the remaining girders by using the embedded lifting loops. Kiewit discovered at the time of the accident that some of the wires were rusted below the surface. (Tr. 169-170). They assert that this discovery, coupled with the fact of the accident itself, made the risk of lifting the other girders by these hooks unreasonable. A near catastrophe having occurred, neither Kiewit nor Raymond could reasonably be expected to imperil the lives of their crew and personnel by lifting other beams in the same manner. Kiewit argues that the potential hazard inherent in using the lifting hooks constituted a special circumstance which mitigated against further use of the hooks as a method of raising the girders.

Bayshore's position is that since 200 girders had been previously lifted and put into place by these hooks, this one accident should have been viewed as a "fluke" and did not necessitate using a different means of lifting the remaining girders.

The court agrees with Kiewit that, given the evidence of rusting in the wires and the serious risks attendant to a similar accident, Kiewit acted reasonably in formulating another method for lifting the beams.

The fact of the accident and the discovery of the rust made another accident of the same sort forseeable. Under these circumstances, should another similar accident have in fact occurred, Kiewit would likely have been held liable or at least been forced to bear its own losses under the broadly accepted rule that no recovery may be had for losses which the person injured might have prevented by reasonable efforts and expenditures. Mayes Company v. State, 18 N.Y.2d 549, 554, 277 N.Y.S.2d 393 (1966).

The burden of proof on the need to minimize damages is on the party seeking to limit recovery. *Mayes, supra*. Bayshore has failed to offer any such proof. Accordingly, the court finds that the alternate means of lifting the beams was reasonable and the additional costs incurred by Kiewit in utilizing a different method are properly assessed against Bayshore as a foreseeable and reasonable expense flowing from Bayshore's breach of warranty and contract. *Long Island Lighting Co. v. City of Glen Cove*, 64 Misc.2d ~~786~~ 768, 315 N.Y.S.2d 656 (1970).

Submit order on five days' notice.

Dated: New York, New York

October 14, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This action having come on for trial before the Honorable Constance Baker Motley, without a jury, on 5, 6, 7 and 10 June 1974, and the Court having made its findings of fact and conclusions of law, dated 14 October 1975 and filed on 30 December 1975, it is

ORDERED AND ADJUDGED that plaintiff Raymond International, Inc. recover $30,200 from defendants and third party plaintiffs, Peter Kiewit-Slattery (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc. (Joint Venture) hereinafter "Peter Kiewit", and from third party defendant, Bayshore Concrete Products Company, hereinafter "Bayshore", jointly and severally, and it is further

ORDERED AND ADJUDGED that Peter Kiewit recover from Bayshore $44,386.22 and any amount that Kiewit may pay to plaintiff Raymond International, Inc., and it is further

ORDERED AND ADJUDGED that Raymond International, Inc. and Peter Kiewit recover interest at the rate of 7.5%

from 28 April 1970 through 31 August 1972, and thereafter at the rate of 6% per annum from 1 September 1972 to the date of this judgment, and it is further

Ordered and adjudged that the Clerk of this court shall tax costs in favor of Plaintiff and Peter Kiewit against Bayshore in accordance with law.

Dated: New York, New York
January 12, 1976

(S) CONSTANCE BAKER MOTLEY
U. S. D. J.

Judgment entered, this 14th day of January, 1976

(S) RAYMOND F. BURGHARDT
Clerk

Notice of Appeal of Third Party Defendant, Bayshore.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Notice is hereby given that Bayshore Concrete Products Company, the third party defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on the 14th day of January, 1976, in favor of the plaintiff and against the defendant Peter Kiewit-Slattery (Joint Venture), and the said third party defendant further appeals from the judgment in favor of the defendant and third party plaintiff Peter Kiewit-Slattery (Joint Venture) and against said third party defendant Bayshore Concrete Products Company, and from each and every part of said judgment.

Dated: New York, N.Y.
February 26, 1976

Yours &c.,

SEMEL, McLAUGHLIN & BOECKMANN
Attorneys for 3rd pty. deft.
Office & P.O. Address
10 Rockefeller Plaza
New York, N.Y. 10020 PL7-8660

By: DOUGLAS A. BOECKMANN
A Member of the Firm
Of Counsel to Segan, Culhane, Nemerov & Geen, Esqs.

Notice of Appeal of Third Party Defendant, Bayshore

To:

Symmers, Fish & Warner, Esqs.
Attys. for plaintiff-respondent
Office & P.O. Address
345 Park Avenue
N.Y., N.Y. 10022

To:

James I. Lysaght, Esqs.
Atty. for deft. & 3rd pty. pltf.-appellant
11 Park Place
N.Y., N.Y. 10007

Notice of Appeal of Defendant and Third Party Plaintiff, Kiewit-Slattery.

UNITED STATES DISTRICT COURT,

Southern District of New York.

[Same Title.]

Please take notice that defendant and third party plaintiff, Peter Kiewit-Slattery (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc., (Joint Venture) hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of Hon. Judge Constance Baker Motley dated January 12, 1976 and entered January 14, 1976 and from each and every part of said judgment except so much of said judgment which ordered and adjudged that said defendant and third party plaintiff, Peter Kiewit Etal, recover from Bayshore Concrete Products Company the sum of $44,386.22 and any amount that Kiewit may pay to the plaintiff, Raymond International Inc. and accept from so much of said judgment which further ordered and adjudged that Peter Kiewit, Etal recover interest at the rate of 7.5 per cent from April 28, 1970 through August 31, 1972 and thereafter at the rate 6 per cent per annum from September 1, 1972 to the date of said judgment and which further ordered and adjudged that the Clerk of the Court tax costs in accordance with the law.

Dated: New York, New York
February 13, 1976

JAMES I. LYSAGHT
by (illegible)
Attorney for Deft. and Third Party
Plaintiff-Appellant
11 Park Place
New York, New York 10007
WOrth 2 3050

Notice of Appeal of Defendant and Third Party Plaintiff, Kiewit-Slattery

To:

Clerk of the United States Court of Appeals Second
Circuit

Symmers, Fish & Warner, Esqs.
Attorneys for Plaintiff-Respondent
345 Park Avenue
New York, New York 10022

Segan, Culhane, Nemerov & Geen, Esqs.
Attorneys for Third Party Defendant-Respondent
253 Broadway
New York, New York

McMahon & Lyons, Esqs.
Attorneys for Third Party Defendant-Respondent
111 Broadway
New York, N.Y. 10006

Services of three (3) copies **of**

the within Joint appendix is

hereby admitted this 20th day

of May, 1976

Jones J Lyrager (JM)

Attorney for defendant - appellant and third-party plaintiff-appellee

Atty for Plaintiff Appellee

MAY 21 2 25 PM '76

SYMMERS, FISH & WARNER

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